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In The

Supreme Court of the United States

October Term, 1998

JENNIFER A. SALISBURY, Secretary of the New Mexico Energy, Minerals and Natural Resources Department and GARY JOHNSON, Governor of the State of New Mexico,

Petitioners,

vs.

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO and EL PASO COUNTY WATER IMPROVEMENT DISTRICT NUMBER 1 OF TEXAS; UNITED STATES DEPARTMENT OF INTERIOR, BRUCE BABBITT, United States Secretary of the Interior,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the federal courts have jurisdiction to decide the property rights and obligations of the State of New Mexico, absent the State's consent, in lands leased in the name of the State of New Mexico since 1964 and used as a state park?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the court below are named in the caption of the case. Gary Johnson and Jennifer A. Salisbury have become the Governor of the State of New Mexico and the Secretary of the New Mexico Energy, Minerals and National Resources Department respectively since this action was originally filed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Governor Gary Johnson and Secretary Jennifer A. Salisbury, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on November 6, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit entered on November 6, 1998, is reported at 160 F.3d 602, and is reprinted in the Appendix hereto at pages App. 1 to App. 23. The opinions of the District Court of New Mexico, entered on July 2, 1997, April 23, 1997, September 16, 1993 and September 3, 1992 were not published and are reprinted in the Appendix at App. 24 to App. 71.

BASIS FOR JURISDICTION

The judgment and opinion of the Court of Appeals was entered on November 6, 1998. This petition for writ of certiorari is filed within ninety (90) days of November 6, 1998. This Court has jurisdiction to review the final judgment of the Court of Appeals for the Tenth Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the application of Subsection I of the Fact Finders Act of 1924, 43 U.S.C. §501, to a lease entered into between the United States of America and the State of New Mexico. The statute is set forth, in relevant part, in the Appendix at App. 72.

STATEMENT OF THE CASE

A. Background

In 1962, Congress authorized the Secretary of the Interior to investigate, plan, construct, operate and maintain basic recreational facilities at Elephant Butte and Caballo Reservoirs of the Rio Grande reclamation project in New Mexico. Congress also authorized the Secretary to enter into an agreement with the State of New Mexico for the administration, operation, and maintenance of the recreational facilities at the two reservoirs. Public Law 87-542, 76 Stat. 171 (1962). Appendix at App. 72-73.

In passing the law to establish these recreational facilities, Congress recognized the serious problems that were occurring because of the State's lack of recreational facilities. In 1959, 1,210,000 people visited Elephant Butte Reservoir for recreational purposes, yet few facilities existed to meet the needs of these visitors. S.Rep. No. 775, 87th Cong., 1st Sess. 2 (1961). Concerns were that the reservoir would be polluted because of the number of visitors at the reservoir and the lack of sanitation facilities. 108 Cong. Rec., July 2, 1962, at 12,542. Assurances were provided to Congress that the State of New Mexico

would take over the responsibility of operating the recreational facilities after the facilities were built. "[T]he State of New Mexico will operate and maintain facilities that will be built by the Federal Government." Rep. Morris, 108 Cong. Rec. July 2, 1962, at 12,542. "[A]s the gentleman from New Mexico [Mr. Morris] has explained, the State of New Mexico has agreed that they will, when these facilities are created, operate them in these two reservoirs." Rep. Saylor, 108 Cong. Rec., July 2, 1962, at 12,543.

Relying upon Congress' action, the New Mexico Legislature authorized the New Mexico Park and Recreation Commission[1] to purchase or lease federal and private lands in the name of the State of New Mexico for park and recreational purposes. The Legislature required that state interests in lands to be used for parks could only be taken in the name of the "State of New Mexico" or in the name of the "Governor of the State of New Mexico and the people thereof." N.M. Stat.Ann. §16-2-13 (1978 Comp.) (1987 Repl. Pamp.). Appendix at App. 75.

The State of New Mexico and the United States entered into several lease agreements, beginning in 1964, allowing the State of New Mexico to operate the recreational facilities at Elephant Butte and Caballo Reservoirs, the latest of which was entered on April 1, 1973. Appendix at App. 76 to App. 98.

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[1] The New Mexico Park and Recreation Commission has been abolished and the task of running state parks rests with the New Mexico Energy, Minerals, and Natural Resources Department.

In accordance with state law, the 1973 lease was entered into in the name of the "State of New Mexico." Appendix at App. 76. The lease provides that there is no obligation to expend funds on the leased lands except " . . . to the extent that funds therefore are available to the Commission for such purpose." Appendix at App. 78-79. This is consistent with state law which requires legislative approval before the State of New Mexico acquires any interest in lands for state park purposes that requires the expenditure of funds for the development of a state park. N.M. Stat.Ann. §16-2-11(J) (1978 Comp.) (1987 Repl. Pamp.). Appendix at App. 74.

Twenty six years after the United States first leased these lands to the State of New Mexico to operate recreational facilities, the plaintiffs filed suit against various federal and state defendants alleging, among other things, that the lease with the State of New Mexico was illegal because it did not provide revenue credits to the plaintiffs from the Secretary of the Interior pursuant to 43 U.S.C. §501.

B. Proceedings Below

On January 25, 1990, the plaintiffs filed their initial complaint. The complaint named the Department of Energy, Minerals and Natural Resources, the State of New Mexico, and Secretary of the Energy, Minerals and Natural Resources Department and the Governor of the State of New Mexico as defendants.

The complaint alleges that the lease between the United States and the State of New Mexico is illegal because the lease provides that all proceeds from the

leased lands are to be used by the State of New Mexico to operate the recreational facilities, leaving no profits for the United States to credit to the plaintiff irrigation districts under 43 U.S.C. §501. The complaint asks that the lease be declared void or that the lease be reformed so that the irrigation districts could be credited with any profits under 43 U.S.C. §501.

By order dated September 16, 1993, the District Court dismissed the State of New Mexico and the Department of Energy, Minerals and Natural Resources from the lawsuit pursuant to the Eleventh Amendment, citing *Papasan v. Allain*, 478 U.S. 265, 276 (1986). Appendix at App. 47 to App. 52. Relying upon the *Ex parte Young* doctrine, the District Court refused to dismiss the Secretary and the Governor saying that the plaintiffs had alleged a violation of 43 U.S.C. §501 and had requested prospective compliance with federal law. However, the District Court reserved ruling to a later date on the State's request to dismiss Count II(C) and (E) based upon the Eleventh Amendment.

By order dated April 23, 1997, the District Court found that the federal defendants had entered into leases with the State of New Mexico, beginning in 1964, for the administration, operation and maintenance of the recreational facilities in question. The Court found that the leases assigned to the State the right to revenues generated from these Project lands. Appendix at App. 33-34. Finding that the plaintiffs are entitled to receive credits from the Secretary of the Interior, at least credits equivalent to the profits generated prior to the development of the recreational facilities, the Court ordered that a hearing be set to reform the State's lease to provide the

plaintiffs with revenue credits pursuant to 43 U.S.C. §501. Appendix at App. 40-41. The district court had ruled previously that plaintiffs' right to receive credits began in 1979, fifteen years after the State first leased the land. Appendix at App. 54.

The Tenth Circuit Court of Appeals affirmed the District Court order on November 6, 1998. The Tenth Circuit Court of Appeals acknowledged that it had to "struggle to find a principled means" to distinguish this case from that of *Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261 (1997) because this case necessarily calls for the federal courts to determine the validity of a state's asserted property interests. Appendix at App. 21. The Tenth Circuit Court of Appeals concluded that the state property interest at stake in this proceeding did not rise to the level of a "special sovereign interest," therefore the Eleventh Amendment is no bar to federal jurisdiction over state officials. Appendix at App. 23. Jurisdiction in the Tenth Circuit Court of Appeals was based upon 28 U.S.C. §1291 which allows the immediate review of final orders of the district court denying a state's claim to Eleventh Amendment immunity.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT CONCERNING FEDERAL COURT JURISDICTION OVER STATE PROPERTY INTERESTS.

A. The Tenth Circuit Court of Appeals decision that federal courts have jurisdiction to determine New Mexico's property interests that were contractually acquired by a lease with the United States of America directly conflicts with decisions of this Court.

This Court has consistently held that the Eleventh Amendment bars federal courts from determining State property interests and from deciding the rights and obligations of a State in a contract unless the State consents. " . . . the Eleventh Amendment bars federal jurisdiction over general title disputes relating to State property interests . . . " *California and State Lands Commission v. Deep Sea Research, Inc.*, 523 U.S. 491, ___, 118 S.Ct. 1464, 1472 (1998). "A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, ___, 117 S.Ct. 2028, 2043-2044 (1997) (O'Connor, J., concurring in part and concurring in judgment) (citations omitted). "It is beyond reasonable dispute that the Eleventh Amendment bars a federal court from deciding the rights and obligations of a State in a contract unless the State consents." *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699-700 (1982) (White, J., concurring in judgment in part and dissenting in part) (citations omitted).

The Tenth Circuit decision conflicts with prior decisions of this Court because the Tenth Circuit reads the concurring opinion of Justice O'Connor in the *Coeur d'Alene* case too narrowly. In *Coeur d'Alene*, Justice O'Connor found that there were two reasons why the *Ex parte Young* doctrine would not apply to that case. First, the case sought to summon a State before the federal courts in a private action seeking to divest the State of a property interest. Second, the case sought to deprive the State of sovereign jurisdiction over the land in question, not just that the State was not entitled to possession. The deprivation of State jurisdiction was found to affect a special sovereign interest of the State. *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. at 2043-2044. The Tenth Circuit decision combines two distinct reasons for not applying the *Ex parte Young* doctrine cited above into one test. The Tenth Circuit has declared that a federal court does have the jurisdiction to determine State property rights and obligations unless the State can show that the property interest is somehow tied to a "special sovereign interest." The State of New Mexico respectfully submits that the decision in *Coeur d'Alene* did not overrule previous decisions of this Court that hold that federal courts do not have jurisdiction to determine State property or contract interests absent the State's consent.

B. Even if the Tenth Circuit is correct in its decision that federal courts have jurisdiction to determine State property interests if the property interest does not involve special sovereign interests, the Tenth Circuit incorrectly decided that a lease for a state park did not involve special sovereign interests of the State of New Mexico.

First, the State of New Mexico has long recognized that the establishment of recreational facilities by the State is important to the public health and welfare. "Opportunities for enjoying general outside recreation, sports and fishing, are recognized as one of the outstanding attractions of our state . . . Indeed, courts have recognized, and now more than ever before recognize, the public's interest in pleasure and sports as a measure of public health." *State ex rel. State Game Commission v. Red River Valley Company*, 51 N.M. 207, 225, 182 P.2d 421, 432 (1945).

Second, when a state enters into a contract pursuant to legislative authorization, the State is exercising a sovereign authority. "Consequently, unless there is some constitutional provision to the contrary, the collective people, calling themselves the State, have the right to make contracts through their government acting pursuant to representative authority." *State ex rel. Creighton University v. Smith*, 217 Neb. 682, 353 N.W.2d 267, 271 (1984).

This Court has held that contracts entered into by the agents of a sovereign are the contracts of the sovereign if the agent was delegated the authority to enter into the contract and the acts of the agent were not unconstitutional, even if there are allegations of illegality or tort. *Larson v. Domestic & Foreign Corporation*, 337 U.S. 682, 689-691 (1949). It is clear in this case that the agents of the State were authorized by both the United States Congress and the New Mexico Legislature to enter into the lease allowing the State of New Mexico to operate the lands as a state park. Because there is no allegation in this case that a state officer has acted unconstitutionally, the contract involved is the contract of the sovereign State of

New Mexico. This Court stated that, "[T]he Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." *Id.*, at 704. Thus, the Tenth Circuit was wrong when it concluded that this contract of the State of New Mexico did not involve special sovereign interests.

CONCLUSION

For the reasons stated, this Court is respectfully urged to grant the writ and to review the opinion and order of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO; EL PASO COUNTY WATER IMPROVEMENT, District No. 1 of Texas,	)	
Plaintiffs-Appellees,	)	No. 97-2188
v.	)	
DEPARTMENT OF THE INTERIOR; MANUEL LUJAN, Secretary of the Interior; DENNIS UNDERWOOD, Commissioner of Reclamation,	)	
Defendants,	)	
and	)	
ANITA LOCKWOOD, Secretary of the State of New Mexico; GARY JOHNSON, Governor of the State of New Mexico,	)	
Defendants-Appellants.	)	

(Filed Nov. 6, 1998)

Appeal from the United States District Court for the District of New Mexico (D.C. No. CIV-90-95-HB)

Herman E. Ortiz (Lee E. Peters with him on the brief) of Hubert & Hernandez, P.A., Las Cruces, New Mexico, for Plaintiffs-Appellees.

Christopher D. Coppin (Tom Udall, Attorney General, and Marilyn S. Hebert, Special Assistant Attorney General, Santa Fe, New Mexico, with him on the briefs), Assistant Attorney General, Albuquerque, New Mexico, for Defendants-Appellants.

Before **BRORBY, McWILLIAMS** and **HENRY,** Circuit Judges.

BRORBY, Circuit Judge.

Introduction

This case involves Eleventh Amendment state sovereign immunity and the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), as applied to state officials accused of a continuing violation of federal law. Plaintiffs, Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District (collectively "Irrigation and Improvement Districts") accuse the United States Department of the Interior and its Secretary (collectively "Federal Defendants"), the State of New Mexico, and certain state officials of illegally retaining net profits under a recreational land lease with the United States. Plaintiffs allege a portion of the net profit from the lease belongs to them under federal land reclamation laws that supersede and antedate the lease between the United States and New Mexico. Citing the general immunity provisions of the Eleventh Amendment and the doctrine

of *Ex parte Young*, the district court dismissed New Mexico and the New Mexico Department of Energy, Minerals and Natural Resources but refused to dismiss Governor Gary Carruthers[1] and Secretary of the New Mexico Energy, Minerals and Natural Resources Department, Anita Lockwood (collectively "state officials"). The district court also ruled Plaintiffs are entitled to their lawful share of net profits, and has ordered a hearing to reform the offending lease provision to properly reflect the division of profits under federal law.

The state officials appeal solely on the basis of the district court's refusal to dismiss them based on Eleventh Amendment immunity. We affirm.

I. Background

Although we review only the district court's decision not to dismiss the state officials pursuant to the Eleventh Amendment and express no opinion as to the merits of the underlying controversy, *see Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, ___, 117 S. Ct. 2028, 2043 (1997) (stating the question before the Court "[was] not the merit of either party's claim, . . . but the relation between the sovereign [interest] at issue and the immunity the State asserts"), in order to determine whether federal jurisdiction is appropriate under the exception to Eleventh Amendment state immunity found in *Ex parte Young*, we must examine "the essential nature and effect of the

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[1] Gary Johnson is the current Governor of New Mexico, Gary Carruthers was the Governor at the time this case was filed.

proceeding, as it appears in the entire record." *In re State of New York*, 256 U.S. 490, 500 (1921) (applicability of *Ex parte Young* "is to be determined not by the mere names of the titular parties"). Therefore, we proceed with an examination of the facts.

This quarrel over profits involving Federal Defendants, the state officers of New Mexico and the Irrigation and Improvement Districts stems from a complex series of land management statutes and land use contracts arising over the course of the past century. The controversy begins with the Reclamation Act of 1902, 32 Stat. 388, as amended and compiled, 43 U.S.C. §§ 372 *et seq.*, which authorized the construction of the Rio Grande Project ("the Project"). The Project was a reclamation effort authorizing the construction of water projects under repayment contracts with various irrigation districts to supply water for growing crops on arid and semi-arid lands in the southwestern United States. Both Plaintiffs control water projects within the Rio Grande Project area.[2] They are responsible for operating and maintaining irrigation systems for their respective portions of the Project area, and cooperating with the United States under federal reclamation law.

In 1937, the United States entered into a contract with the irrigation district and the predecessor in interest to the improvement district to sell Plaintiffs' right to use and develop stored water on the Project lands for the

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[2] The Elephant Butte Irrigation District is a quasi-municipal corporation organized and operating under New Mexico law, while El Paso County Water Improvement District is a Texas public corporation.

purposes of hydroelectric power generation. In return for the sale of these power privileges, the Irrigation and Improvement Districts received, among other things, the benefits accorded under Subsection I of the Fact Finders Act of 1924, 43 U.S.C. § 501. The primary benefit under this provision is the right to credit for accumulated net profits derived from various uses of the Rio Grande Project lands.[3]

The potential for conflict over these profits did not arise until many years later, when Congress enacted Pub. L. No. 87-542, 76 Stat. 171 (1962). This statute authorized the establishment and administration of "basic [public] recreation facilities at the Elephant Butte and Caballo Reservoirs" and allowed the Federal Defendants to enter into a lease agreement with the State of New Mexico for the "administration, operation, and maintenance" of the public recreation facilities. *Id.* at §§ 1, 3. Pursuant to this statute, Federal Defendants entered into two separate lease agreements with New Mexico, one in 1964 and the other in 1973. Under these lease agreements, Federal

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[3] The Fact Finders Act of 1924, 43 U.S.C. § 501, provides in relevant part:

> Whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the *total accumulated net profits*, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites *shall be credited to the construction charge of the project*, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually. . . .

(Emphasis added.)

Defendants assigned to New Mexico the right to revenues generated from the leased premises. The leases covered grazing and farm lands of the Rio Grande Project, from which the Project had historically received credit for net profits. This assignment of profits from the Project lands to New Mexico contravened the prior appropriation of net profits to the Irrigation and Improvement Districts under prior agreements codified in federal law, thus giving rise to the present controversy.

Plaintiffs' standing to claim credit for net profits as a third-party beneficiary of the lease between New Mexico and the United States did not begin until 1979 and 1981, when the Irrigation and Improvement Districts each took control of their respective portions of the Project area encompassing Elephant Butte Reservoir and Caballo Reservoir. However, Plaintiffs did not file their lawsuit until 1990, well beyond the six-year statute of limitations for federal claims. *See* 28 U.S.C. § 2401(a) (1994). The district court allowed the suit to proceed under the "continuing claim" doctrine.[4]

The Irrigation and Improvement Districts seek to vindicate their rights under federal law as third-party beneficiaries of the lease agreement between the United States and New Mexico. The majority of Plaintiffs' complaint seeks relief only from the named Federal Defendants;

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[4] Under the continuing-claim doctrine, where the party is to make periodic payments, "each successive failure to make proper payment gives rise to a new claim upon which suit can be brought," even when the grounds for refusing to pay occurred more than six years before. *Friedman v. United States*, 310 F.2d 381, 385 (Ct. Cl.), cert. denied, 373 U.S. 932 (1962).

however, Count II of the amended complaint is also directed at the state and state officials as co-defendants. Plaintiffs request, *inter alia*, "an order declaring the lease agreement with the State of New Mexico void as an ultra vires act and as unconscionable or, alternatively, for reformation of the lease contract in equity to require prospective compliance with Federal Law by providing revenues to the Project beneficiaries." Even though Plaintiffs' primary dispute is with the United States for the alleged violation of Subsection I of the Fact Finders Act, Plaintiffs included the state defendants so that all the parties necessary to reform the contested lease provision were before the court.

The district court granted Plaintiffs' motion for summary judgment as to Count II(B) of the complaint, and determined the Irrigation and Improvement Districts are entitled to have the lease between the Federal Defendants and the State of New Mexico reformed to reflect their preeminent right to profits from categorical uses of the recreation area lands. New Mexico moved to dismiss the suit based on state sovereign immunity under the Eleventh Amendment. The district court granted the motion to dismiss, but only as to the State of New Mexico, not the state officials. The district court ruled the state officials were committing an ongoing violation of federal law and thus their conduct fell squarely within the *Ex parte Young* exception to the general rule of Eleventh Amendment state immunity.

II. Discussion

A. Jurisdiction

This court has jurisdiction to hear this interlocutory appeal under the collateral order doctrine of *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). *See also Garramone v. Romo*, 94 F.3d 1446, 1452 (10th Cir. 1996) (allowing an interlocutory appeal from the denial of claim of Eleventh Amendment sovereign immunity under the collateral order doctrine). We review *de novo* a district court's consideration of subject-matter jurisdiction in the context of a Fed. R. Civ. P. 12(b)(1) motion to dismiss based on Eleventh Amendment immunity. *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1186 (10th Cir. 1998).

B. The Eleventh Amendment and *Ex parte Young* – An Overview

The Eleventh Amendment generally bars suits against a state in federal court commenced by citizens of that state or citizens of another state. *See Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890). This concept of state sovereign immunity is based on the traditional notion that a state should not be " 'amenable to the suit of an individual without its consent.' " *Hans*, 134 U.S. at 13 (1890) (quoting *The Federalist*, No. 81 (A. Hamilton)). There are, however, two clearly recognized exceptions to the general immunity protections of the Eleventh Amendment: (1) a state may consent to be sued, or (2) Congress may clearly and expressly abrogate the states' immunity. *See ANR Pipeline*, 150 F.3d at 1187. Neither exception is applicable

to the present appeal.[5] So, we turn our attention to the third judicially created alternative for avoiding the general application of state sovereign immunity – the *Ex parte Young* doctrine.

The *Ex parte Young* doctrine is not actually an exception to Eleventh Amendment state immunity because it applies only when the lawsuit involves an action against state officials, not against the state. Generally, the law considers state officials acting in their official capacities to be acting on behalf of the state and immune from unconsented lawsuits under the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is not a suit against the official personally, for the real party in interest is the entity."); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984). However, *Ex parte Young* creates a narrow exception to this general rule. In *Ex parte Young*, the Supreme Court held the Eleventh Amendment generally does not bar a suit against a state official in federal court which seeks only prospective equitable relief for violations of federal law, even if the state is immune. *Ex parte Young*, 209 U.S. 123, 159-60 (1908) The Court "recognize[d] that if a state official

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[5] The fact the state appeared and contested this case in the proceedings below does not indicate consent to suit under the Eleventh Amendment. *See Florida v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) ("[t]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised at any point during the proceedings).

violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct." *Coeur d'Alene Tribe*, 521 U.S. at ___, 117 S. Ct. at 2043 (1997) (O'Connor, J., concurring). For years, the Supreme Court has applied *Ex parte Young* to allow suits for prospective relief against a state officer to enjoin future violations of federal law, but it has consistently prohibited any retroactive or compensatory relief. *Edelman*, 415 U.S. at 666-68 (relief that includes retroactive payments, even if brought against a state official, is actually a suit against the state and barred by the Eleventh Amendment).

The general doctrine from *Ex parte Young* allows expanded federal jurisdiction over state action, and gives the federal courts a powerful tool for ensuring state compliance with federal laws. However, the decision whether to apply *Ex parte Young* and allow a suit to proceed in federal court is often less than clear, and case law in this area reveals the difficulty of drawing principled distinctions on the facts of different cases. Courts struggle to find a compromise between vindicating the supremacy of federal law and upholding the immunity of the states under the Eleventh Amendment. This is especially true when, as in the case before us, the controversy involves not simply a violation of federal law, but relief impacting the validity of an asserted state property interest.[6]

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[6] Many of the cases cited by both parties illustrate how state property interests impact whether the court chooses to exercise jurisdiction over state officials. *Compare Treasure Salvors*, 458 U.S. at 697 (Court agreed that where state has a colorable claim to a possessory interest in property, absent the state's consent, the federal district court had no power to

The struggle to define the limits of the *Ex parte Young* doctrine is evident from recent Supreme Court precedent. In *Coeur d'Alene Tribe*, the Supreme Court barred federal jurisdiction over claims for purely prospective relief against a state official to compel compliance with federal law.[7] *Coeur d'Alene Tribe* involved a suit by an Indian

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adjudicate the state's interest in the property), *and Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945) (barring federal jurisdiction over taxpayer's suit against state officials to recover gross income taxes paid because the suit was in reality an action against the state and required the payment from the state treasury) and *ANR Pipeline*, 150 F.3d at 1193 (applying *Coeur d'Alene Tribe* to deny federal jurisdiction finding that the state had a "special and fundamental interest" in maintaining authority over its power to assess and levy property taxes), *with Ex parte Young*, 209 U.S. 123 (allowing suit to proceed in federal court to address prevention of unconstitutional state conduct, but the case did not substantially involve state property interests), *and Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477 (10th Cir. 1995) (allowing federal jurisdiction, but this case involved a request to enjoin a state's continuing violation of provisions of a federal environmental law and did not principally involve a state property interest), *and Johns v. Stewart* 57 F.3d 1544 (10th Cir. 1995) (Court held the Eleventh Amendment did not bar the portion of the Plaintiffs' complaint seeking prospective relief preventing an ongoing violation of federal law, but no state property interest was implicated. Although the suit required the state to distribute monies under the Social Security Act, the state did not have a property interest in the benefit payments. The state was merely overseeing a federal program.).

[7] *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), decided in the term just before *Coeur d'Alene*, also denied federal jurisdiction under *Ex parte Young*, even in the face of an alleged violation of federal law, in cases where Congress has already "prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Id.* at 74. Although the case is

Tribe against Idaho's state officials to establish the Tribe's ownership rights to submerged lands within the boundaries of a reservation established under federal law in 1873. 521 U.S. at ___, 117 S. Ct. at 2032. The Court held that even when a suit is commenced against state officials, and "the [plaintiff] has alleged an on-going violation of its property rights in contravention of federal law and seeks prospective injunctive relief," that is not enough to invoke the *Ex parte Young* doctrine if the suit over property interests is the "*functional equivalent* of a quiet title action which implicates special sovereignty interests." *Id.* at 2040 (emphasis added). The Court found "the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake," and that to "interpret *Young* to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." *Id.* at 2034. The Court suggested that if the relief requested involved the adjudication of property interests (like a quiet title action) that "implicate[ ] special

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instructive regarding the new limits placed on the *Ex parte Young* doctrine and the trend toward narrowing its scope, the central holding of *Seminole Tribe* has little relevance to this present appeal. In the case before us, no alternative, Congressionally mandated statute limits or prevents federal jurisdiction in this matter, so Plaintiffs are not automatically precluded from bringing the suit in federal court against the state officials.

sovereignty interests" and is coupled with far-reaching and invasive relief, the *Ex parte Young* doctrine is inapplicable, and the state should be allowed to respond to the claims against it in its own courts. *Id.* at 2040, 2043.

Coeur d'Alene Tribe imposes an important new requirement on us. We must examine whether the relief Plaintiffs seek against the state officials "implicates special sovereignty interests," and "whether that requested relief is the functional equivalent to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment." *ANR Pipeline*, 150 F.3d at 1190. Accordingly, we add this latest pronouncement to the traditional three-part inquiry articulated in *Treasure Salvors*, 458 U.S. 670, to establish a framework for determining whether a suit against a state official is barred under the Eleventh Amendment. First, we must determine whether this is an action against the state officials or against the State of New Mexico itself; second, whether the alleged conduct of the state officials constitutes a violation of federal law, or merely a tortious interference with Plaintiffs' property rights; third, whether the relief Plaintiffs seek is permissible prospective relief or is it analogous to a retroactive award of damages impacting the state treasury; *Treasure Salvors*, 458 U.S. at 690, and finally, whether the suit rises to the level of implicating "special sovereignty interests." *ANR Pipeline*, 150 F.3d at 1193 (internal citation omitted).

C. Application

(1) Is this a proper suit against state officials?

The state officials argue the State of New Mexico is the real party in interest because the lease the district court intends to reform was entered into between the United States and an agency of the State of New Mexico. They also argue all of their conduct with regard to the lease and the disputed profits was authorized, official state action, thus immunizing them under the state's Eleventh Amendment protection. Even though these allegations would appear to immunize the state officials, these arguments fail to understand the *Ex parte Young* exception. Because the states cannot authorize any act that violates federal law, the Supreme Court has established that an action seeking to prospectively enjoin a state official's ongoing violation of federal law is not barred by the Eleventh Amendment. *Pennhurst*, 465 U.S. at 102 ("a suit challenging the constitutionality of a state official's action is not one against the State"). Even though the state officials claim to act under the authority of valid state law, if their conduct is not in accord with federal law the state cannot cloak their actions with state authority or state immunity. *Ex parte Young*, 209 U.S. at 160.

In the present case, the state officials were acting pursuant to state law authorizing the development of recreation areas under the lease agreement with the United States. *See* N.M. Stat. Ann. §§ 16-2-11(A) & (J), 16-2-12, 16-2-13 (Michie 1978) (state law authorizing, *inter alia*, the state to acquire lands or interests in lands in the name of the state, for state park purposes, subject to

legislative approval). However, because the lease agreement allegedly conflicted with federal law at its inception, the state officials' acts of signing the lease and subsequently accepting benefits under the assignment provision may constitute an ongoing violation of federal law. Accordingly, Plaintiffs' claims are properly brought against the state officials, not the state. The state is not the real party in interest because the state cannot "authorize" the officials to violate federal law. *See Ex parte Young*, 209 U.S. at 159-60 (holding that when a state official seeks to enforce a state legislative enactment that is void because unconstitutional, the state officer comes into conflict with the supremacy of the federal law and enjoys no immunity).[8]

(2) Violation of federal law or tortious interference with property rights

As a general rule, if the state officials' conduct was authorized by state law, and no federal rights were infringed, then the alleged violation of Plaintiffs' rights is merely tortious interference and the Eleventh Amendment bars federal jurisdiction. *Larson v. Domestic & Foreign Commerce, Corp.*, 337 U.S. 682, 693 (1949). Although

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[8] We also note that even though the State of New Mexico itself was named but subsequently dismissed from the suit, its dismissal does not mean the state officials are also automatically discharged. The suit is properly brought against the state officials, even in the absence of the State of New Mexico. "Neither the fact that the State elected to defend on behalf of its agents, nor the fact that the District Court purported to adjudicate the rights of the State, deprive[ ] the federal court of jurisdiction that had been properly invoked over other parties." *Treasure Salvors*, 458 U.S. at 691-92.

this rule from *Larson* appears to require us to ascertain whether state officials actually violated federal law, in fact we do not need to dispositively decide this question. The Supreme Court has ruled we need only determine whether Plaintiffs state a non-frivolous, substantial claim for relief against the state officials that does not merely allege a violation of federal law "solely for the purpose of obtaining jurisdiction." *Larson*, 337 U.S. at 690 n.10 (1949); *see also Tindal v. Wesley*, 167 U.S. 204, 216 (1897) ("It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration."). Even "[t]he possibility that a defendant will ultimately prevail on the merits does not clothe that defendant in Eleventh Amendment immunity." *Coeur d'Alene Tribe v. Idaho*, 42 F.3d 1244, 1251 (9th Cir. 1994), *cert. denied*, 517 U.S. 1133 (1996), and *rev'd on other grounds*, 117 S. Ct. 2028 (1997).

Plaintiffs' complaint seeks prospective equitable relief to enjoin the state officials from committing continuing violations of federal law. The Irrigation and Improvement Districts claim the lease between the United States and New Mexico contains an assignment clause that violates existing federal law, and, as parties to the lease and knowing recipients of the illegal benefits under the assignment provision, the state officials are committing an ongoing violation of federal law. State officials, on the other hand, argue they are not violating federal law and cannot violate the terms of Subsection I of the Fact Finders Act, upon which Plaintiffs base their claims to credit for profits. We find the state officials' argument unpersuasive. The factual record indicates the United States assigned the right to profits from the

operation, maintenance and development of a recreation area on Project lands to the State of New Mexico under the 1964 and 1973 leases. New Mexico has continued to retain the profits, if any, from use of the recreation areas over the term of the lease. This arrangement arguably contravenes prior agreements and statutory provisions that provide Plaintiffs with the preeminent right to a portion of the profits. We have, in this instance, a lease between the State of New Mexico and the United States that conflicts with existing federal law. The district court could find federal law was violated both at the inception of the lease and each time the state retained profits that ought to have been credited to the Irrigation and Improvement Districts. Simply because a federal law, like the Fact Finders Act, specifically imposes affirmative obligations on the federal government, does not mean state action cannot also violate that law. Such a conclusion would lead to absurd results and undermine the supremacy of federal law. If the state action aids, encourages, cooperates with, or accepts the benefits of a federal governmental violation of federal law, we believe the state is also potentially culpable.[9] That is precisely the

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[9] Government contracts must comply with statutory laws and regulations. The state officials, on behalf of the State of New Mexico, entered a lease (contract) with the United States that violated Subsection I of the Fact Finders Act. Accordingly, the state officials are on "direct notice," constructive or otherwise, that the lease is "plainly illegal." *Total Med. Management, Inc. v. United States* 104 F.3d 1314, 1319 (Fed. Cir. 1997) This at the very least raises a substantial issue as to whether the state officials' acceptance of the disputed profits while participating in the development of the recreation areas under the lease agreements is an ongoing violation of federal law.

situation we have in this case. New Mexico is purportedly enjoying the benefits the federal government unlawfully assigned to them. Accordingly, without deciding the merits of their claims, we hold Plaintiffs have made an adequate, substantial, and non-frivolous allegation that the state officials are committing violations of federal law, not merely a tortious interference with Plaintiffs' property rights. Plaintiffs' claim is sufficient to support federal jurisdiction, assuming the other requirements for the application of the *Ex parte Young* doctrine are met.

(3) Is the relief sought permissible prospective relief?

Plaintiffs argue the relief they request will have no effect on the state treasury of New Mexico because they seek only prospective compliance with federal law. However, the prospective/retrospective analysis is often not as simple as it appears. In many instances, even prospective relief will burden the state's treasury to some degree. *Edelman*, 415 U.S. at 668. The "overriding question" is not whether the relief will require the payment of state funds, but whether the relief will "remedy future rather than past wrongs." *Coeur d'Alene Tribe*, 42 F.3d at 1252 ("An injunction that will in practical effect require payment of funds out of the state treasury is nonetheless permissible if it requires only that officials conform their future actions to federal law." (Internal citation omitted.)).

Even though the request for relief against the state officials in this case will affect New Mexico's interest in profits under the assignment clause of the lease, the relief will have no retrospective effect. The relief Plaintiffs seek will only affect the state's right to future revenues. While

this may cause difficulties for New Mexico and require additional expenditures from the state's coffers in order to effectively operate and maintain the affected recreation areas, it does not transform Plaintiffs' claim into an impermissible request for retrospective relief or damages.

The state officials also argue the *Ex parte Young* doctrine does not allow the courts to interfere with their discretionary acts. Although this general premise is sound, *Ex parte Young* does not extend this rule to preclude judicial review of discretionary acts that violate federal law. *See* 209 U.S. at 158-59 (holding the state officials' "general discretion regarding the enforcement of the laws . . . is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of the complainant."). In the present case, it is true the law will not permit the courts to force New Mexico officials into negotiating changes in lease agreements, but it certainly permits the courts to vindicate federal rights. Plaintiffs have sufficiently alleged a federal violation, and we will not deny jurisdiction solely on the basis that a ruling might indirectly impact state officials' discretionary acts.

Even if Plaintiffs meet all the traditional requirements for the application of the *Ex parte Young* doctrine we have discussed above, that does not *automatically* allow the suit to proceed in federal court. The rule from *Coeur d'Alene Tribe* requires a more thorough investigation into the nature of the claim, the state's interest and the potential effect of the requested relief in order to determine what sovereign interests the court's decision might affect and whether federal jurisdiction is appropriate.

(4) Are special sovereign interests at stake?

After *Coeur d'Alene*, if we determine the relief Plaintiffs seek, although prospective and not tantamount to a damages award, is an excessive intrusion into an area of special state sovereign interest, *Ex Parte Young* does not apply, and the the [sic] Eleventh Amendment bars the suit. *Coeur d'Alene Tribe*, 521 U.S. at ___, 117 S. Ct. at 2043. However, if the relief involves enjoining a continuing violation of federal law that would have only an incidental effect on special state sovereign interests, then federal jurisdiction is proper under the traditional approach to *Ex Parte Young*.

The fundamental difficulty with the present suit in terms of the sovereign interests at stake, is that in addition to involving a possible continuing violation of federal law, it also has a direct bearing on the validity of New Mexico's claim to profits under the lease. The district court is primarily adjudicating the validity of the state's asserted property interest, even if the court decides the illegality of the assignment provision voided any state property interest from the inception of the lease. Any decision and remedy in this matter at the very least affects the validity of the state's asserted property interest in the revenues and poses a challenge to its current position with regard to the recreation area lands. Thus, we find ourselves in virtually the same dilemma the Ninth Circuit articulated in its *Coeur d'Alene Tribe* opinion. We are constrained by two general principles: (1) "federal courts may not hear actions to quiet title to property in which the state claims an interest, without the state's consent," and (2) "declaratory and injunctive relief against state officials to foreclose future violations of

federal law is available even if that relief works to put the plaintiff in possession of property also claimed by the state." 42 F.3d at 1252 (9th Cir. 1994) (internal citation omitted). Admittedly, the district court is not "quieting title" to the state's real property in this case, but it is determining the validity of a property interest – New Mexico's claim to profits under the lease. *Id.* We struggle to find a principled means of distinguishing the real property interest at stake in *Coeur d'Alene Tribe* with New Mexico's asserted right to income under the assignment provision of the lease in the present case. Both the State of Idaho's interest in submerged lands in *Coeur d'Alene Tribe*, and New Mexico's interest in profits from the recreation areas, although qualitatively different, fall under the general heading of "state property."

It is easy to understand how a majority of the Justices in *Coeur d'Alene Tribe* could decide that the Tribe's suit to divest the State of Idaho of all authority and ownership over submerged lands was actually a suit against the state. 521 U.S. at ___, 117 S. Ct. at 2047 (O'Connor, J. concurring). However, it is more difficult to say whether the Court intended its ruling to extend to every situation where a state property interest is at issue. We believe the holding of *Coeur d'Alene Tribe* does not extend that far, but instead reflects the extreme and unusual case in which, although the doctrine of *Ex parte Young* under traditional principles is applicable, the suit is prohibited because it involves "particular and special circumstances," *id.* at 2043, that affect "special sovereignty interests" and cause "offense to [the state's] sovereign authority," *id.* at 2040.

In this light, we examine whether the property interest rises to the level of a "special sovereignty interest,"

ANR Pipeline, 150 F.3d at 1193 (internal citation omitted). After looking at the complete record before us, we decide that although the relief accorded to Plaintiffs will affect the State of New Mexico's future interest in profits under the recreational land lease, either through reformation of the lease or some other form of equitable relief, this impact on state interests does not rise to the level of implicating special sovereignty interests. We rest our decision on a variety of factors we find implicit in the Supreme Court's ruling in *Coeur d'Alene Tribe* and our recent application of its holding in *ANR Pipeline*. First, we cannot say the relief the Irrigation and Improvement Districts request is as far-reaching or intrusive as that sought in *Coeur d'Alene Tribe* and *ANR Pipeline*. The State of Idaho's interest in its submerged lands in *Coeur d'Alene Tribe*, and the State of Kansas' interest in its property tax scheme in *ANR Pipeline* present state sovereign interests to a degree not attained by New Mexico's claims in the present case. Second, the remedy in this case only presents the possibility of a readjustment of priorities for the distribution of profits from certain uses of Project lands, not an impermissible affront to New Mexico's political authority. Our decision to allow this suit in federal court will have minimal effect on the sovereignty and autonomy of the State of New Mexico. Finally, the balance of New Mexico's interest and the federal rights and interests at stake in this matter swings decidedly in favor of federal jurisdiction. *See Papasan v. Alain*, 478 U.S. 265, 277 (1986) (recognizing certain types of cases formally meet the requirements of *Ex parte Young*, but "stretch that case too far and would upset the balance of federal and state interests"). The interest of vindicating the federal rights

and answering the federal questions involved substantially outweigh the state's sovereign interests. *See id.* These considerations, coupled with the traditional analysis supporting the application of the *Ex parte Young* doctrine persuade us the relief Plaintiffs seek does not impermissibly intrude upon the state's "dignity and status" as a sovereign government. *ANR Pipeline*, 150 F.3d at 1194.

IV. Summary & Disposition

Since the state property interest at stake in this proceeding does not rise to the level of a "special sovereign interest," nor is this suit the "functional equivalent" of an action against the state "implicat[ing] special sovereignty interests," the Eleventh Amendment is not a bar to federal jurisdiction over the state officials. *Coeur d'Alene Tribe*, 521 U.S. at ___, 117 S. Ct. at 2040. Accordingly, we **AFFIRM** the decision of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEPHANT BUTTE IRRIGATION DISTRICT, et al.,

Plaintiffs,

vs.

Civ. No. 90-095-HB

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

(Filed Jul. 2, 1997)

ORDER

This matter is before the Court on Plaintiffs Elephant Butte Irrigation District (EBID) and El Paso County Water Improvement District No. 1 (EPCWID) Motion for Certification of Frivolousness and Forfeiture of Appeal, filed June 30, 1997. Having reviewed the motion, the memoranda in support and in opposition, and the applicable law, the Court finds that the motion is not well taken and will be denied.

On February 23, 1990, State Defendants filed their Motion to Dismiss Count II of Plaintiffs' Complaint, based on Eleventh Amendment immunity. After the Court allowed Plaintiffs to amend their Complaint, State Defendants filed their second Motion to Dismiss again raising Eleventh Amendment immunity, on April 16, 1993. On September 16, 1993, the Court entered its order ruling that on the basis of Eleventh Amendment immunity the State of New Mexico and the State's Department

of Energy, Minerals and Natural Resources be dismissed from the lawsuit. However, the Court denied Eleventh Amendment immunity to the Governor of New Mexico and the Secretary of the Department of Energy, Minerals and Natural Resources. The Court also rejected State Defendants' contention that the relief requested by Plaintiffs was barred by the Eleventh Amendment as to Count II (A) and (B). The Court then reserved ruling on the relief requested in Count II (C) and (E). On April 23, 1997, the Court entered its order addressing Count II (C) and (E). Defendants filed their Notice of Appeal on June 10, 1997.

Plaintiffs claim that the State Defendants do not have the right to an interlocutory appeal of the April 23, 1997 Order. Plaintiffs claim the April 23, 1997 Order is not a final decision under 28 U.S.C. § 1291 or appealable under the collateral order exception and is not appealable under 28 U.S.C. § 1292. Plaintiffs further claim that the April 23, 1997 Order does not contain the statement required by 28 U.S.C. § 1292(b) which allows interlocutory appeals of non-final orders. Finally, Plaintiffs claim that even if State Defendants had a right to an interlocutory appeal of the Court's April 23, 1997 Order, the Notice of Appeal is untimely because State Defendants filed their Notice of Appeal forty-eight (48) days after the Court entered its order.

"The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Stewart v. Donges*, 915 F.2d 572, 574 (10th Cir. 1990). Pursuant to Fed. R. App. P. 4(a)(1), State Defendants had sixty (60)

days to file their Notice of Appeal. Thus, State Defendants timely filed their Notice of Appeal. Moreover, the Court declines to certify State Defendants's Notice of Appeal as frivolous. The Court's September 16, 1993 Order left unresolved whether Court II (C) and (E) were the types of relief barred by the Eleventh Amendment. Accordingly, Plaintiffs' Motion for Certification of Frivolousness and Forfeiture of Appeal is denied.

NOW, THEREFORE,

IT IS HEREBY ORDERED that Plaintiffs Motion for Certification of Frivolousness and Forfeiture of Appeal, filed June 30, 1997, is denied.

/s/ Howard C. Bratton
HOWARD C. BRATTON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO and EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO.1 OF TEXAS,

Plaintiffs,

vs.

Civ. No. 90-95-HB

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Apr. 23, 1997)

(Entered On Docket 4/23/97)

The following motions are before the Court: (1) the parties' Cross-motions for Partial Summary Judgment as to Count II; (2) Federal Defendants' Motion for Summary Judgment as to Count V; and (3) Federal Defendants' Motion for Summary Judgment as to Count VI. Having reviewed the motions, the parties memorandum in support and in opposition, and the applicable law, the Court finds that the Plaintiffs' Motion for Partial Summary Judgment as to Count II is well taken and will be granted. Defendants' Joint Motion for Partial Summary Judgment as to Count II is not well taken and will be denied. Federal Defendants' Motion for Summary Judgment as to Count V is granted. Federal Defendants Motion for Summary Judgment as to Count VI is granted.

I. Summary Judgment Standard

The Court may grant a motion for summary judgment only in cases where, looking at the facts in the light most favorable to the non-movant, there are no issues of material fact and the movant is entitled to judgment as a matter of law. *Thomas v. United States Dep't of Energy*, 719 F.2d 342, 344 (10th Cir. 1983); Fed. R. Civ. P. 56(c). The movant carries the burden of establishing that there are no genuine issues of material fact, *Adickes v. S. H. Kress*, 398 U.S. 144, 157 (1970), but may discharge its burden by showing there is an absence of evidence to support the non-movant's case, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant meets its burden, the burden shifts to the non-movant to demonstrate a genuine issue for trial on a material matter. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). However, once the burden shifts to the non-movant, that party may not rest on its pleadings but must set forth specific facts showing there is a genuine issue for trial as to those dispositive matters for which it carries the burden *Celotex*, 477 U.S. at 324. If the non-movant cannot make such a showing, after adequate time for discovery, summary judgment is mandated. *Id.* at 322.

II. Motion for Summary Judgment as to Count V[1]

Count V of Plaintiffs' Amended Complaint asserts a claim seeking a declaratory judgment that Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (hereinafter "the Districts") "are legally and contractually entitled to receive title to the project works, excluding the reservoirs and works necessary for their protection." They request the Court order Federal Defendants to immediately transfer title to the Districts. According to Plaintiffs, "the return of the irrigation works has been authorized since the promulgation of the first Reclamation laws in 1902 and has been the understanding of the parties since the inception of their contractual relationship." Plaintiffs' Memorandum in Opposition to Federal Defendants' Motion for Summary Judgment as to Count V at 2, fn. 1 (hereinafter Plaintiffs' Response as to Count V).

It is questionable whether the Court has the power to grant title to federal lands without an act of Congress. The sole authority to dispose of public lands is vested in

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[1] Defendants' motion is more properly one for judgment on the pleadings. A judgment on the pleadings under Fed. R. Civ. P. 12(b)(c) is treated as a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *McHenry v. Utah Valley Hosp.*, 927 F.2d 1125, 1126 (10th Cir.), *cert. denied*, 502 U.S. 894 (1991). The Court will grant a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief. *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991). The Court must accept all well-pleaded allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991).

Congress. U.S. Const. art. IV, §3, cl. 2[2]. Any grant of authority to convey public lands must be clearly stated and nothing is to be implied into the statutory language used by Congress. *United States v. Union Pac. R. Co.*, 353 U.S. 112, 116 (1957).

A. Reconveyance of the Project Irrigation Works Pursuant to Reclamation Law

Plaintiffs request the Court construe the language contained in Section 6 of the Reclamation Act of 1902 to give the Secretary of Interior the authority to convey Project lands to the Districts without further Congressional action. Section 6 of the Reclamation Act enacted in 1902 provides as follows:

> The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act. Provided, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be

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[2] Article IV, § 3, cl. 2 provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

> acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

43 U.S.C. §§ 491, 498 (1986), 32 Stat. 389. Plaintiffs argue that Section 6 first directs the Secretary to operate and maintain all reservoirs and irrigation works by using the reclamation fund. According to Plaintiffs, Section 6 then provides that, at a certain point, control over the irrigation works was to be turned over to the project water users. Plaintiffs acknowledge that Section 6 does not expressly use the word "title" when it provided that management of the irrigation works was to pass to the project members. However, because the last sentence of Section 6 clearly and unambiguously provides that title, management, and operation of the "reservoirs and the works necessary for their protection and operation" shall remain in the Government until otherwise provided by Congress, Plaintiffs contend that the absence of similar language in the second sentence of Section 6 authorizes the Secretary to turn over title to the irrigation works to the Districts without future Congressional action. Plaintiffs claim that because of this statutory ambiguity, the Court must examine the circumstances existing at the time the 1902 Reclamation Act was enacted.

Section 6 clearly and unambiguously provides that " . . . the *management and operation* of such irrigation works shall pass to the owners of the lands irrigated thereby. . . . " The Court will not read a congressional intent to convey title to the irrigation works from this

language. The only express grant of authority to transfer title to the Districts of any property that is part of the Rio Grande Project is the authority recently given to the Bureau of Reclamation in Pub.L. 102-575, § 3301. This section provides:

> The Secretary is authorized to transfer to the Elephant Butte Irrigation District, New Mexico, and El Paso County Water Improvement District No. 1, Texas, without cost to the respective district, title to such easements, ditches, laterals, canals, drains, and other rights-of-way, which the United States has acquired on behalf of the project, that are used solely for the purpose of serving the respective district's lands and which the Secretary determines are necessary to enable the respective district to carry out operation and maintenance with respect to that portion of the Rio Grande Project to be transferred. The transfer of the title to such easements, ditches, laterals, canals, drains, and other rights-of-way located in New Mexico, which the Secretary has, that are used for the purpose of jointly serving Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1, may be transferred to Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1, jointly upon agreement by the Secretary and both districts. Any transfer under this section shall be subject to the condition that the respective district assume responsibility for operating and maintaining their portion of the project.

If Plaintiffs' contentions were correct, Congress would not have had to enact Pub.L. 102-575, authorizing the Secretary to transfer to the Districts " . . . title to such

easements, ditches, laterals, canals, drains, and other rights-of-way, which the United States has acquired on behalf of the project. . . . " Moreover, had Congress intended to convey other Project lands to the Districts, it would have done so in Pub.L. 102-575, § 3301.

B. Reconveyance of the Project Irrigation Works Pursuant to Contract

Plaintiffs also contend they are contractually entitled to reconveyance of title to the irrigation works. Plaintiffs concede there was no provision for transfer of title to the irrigation works to the Districts in the June 15, 1918 contract and the 1937 contract. Plaintiffs' Response as to Count V at 36. Plaintiffs claim, however, that "the irrigation districts understood that when project costs were fully repaid by them in 1971 (EBID) and 1975 (El Paso District No. 1), then title as well as operation and maintenance of the irrigation works would be returned to them." *Id.* at 37. Plaintiffs rely on the February 15, 1979 contract. Plaintiffs argue that since the 1979 contract addressed "transfer of District Works" and listed and identified irrigation works on Exhibit A to the contract, such identified canals, laterals, and drains "were a determination by Federal Defendants that these were not 'necessary' for the protection and operation of the reservoirs." *Id.* at 38. Plaintiffs argue upon execution of the contract, the United States was to transfer to Plaintiff EBID the transferred District works as identified on Exhibit A.

According to Plaintiffs, the 1979 contract provides for separate duties and liabilities relating to the "transferred

District works." First, the United States "shall transfer" to EBID the "transferred District works" identified in Exhibit A attached to the contract, and second, the district "shall assume" the operation and maintenance of the transferred works so identified. Plaintiffs argue this would imply that "transfer" implies title to the District works rather than just transfer of the operation and maintenance of the District works. However, Plaintiffs concede the term "transfer" is not defined by the contract. The Court cannot accept Plaintiffs interpretation of the 1979 contract. The contracts with the Districts speak only of the transfer of the operation and maintenance of the irrigation works and never expressly mentions title to Project lands. Accordingly, Federal Defendant's Motion for Summary Judgment as to Count V is granted.

II. The Parties' Cross-motions for Partial Summary Judgment as to Count II

In 1962, Congress enacted 76 Stat. 171, which "provided for the establishment and administration of basic public recreation facilities at the Elephant Butte and Caballo Reservoir areas." The Act also authorized the Federal Defendants to enter into an agreement with a subdivision of the State of New Mexico for the administration, operation, and maintenance of the public recreation facilities. Subsequent to passage of 76 Stat. 171, the Federal Defendants executed two lease agreements with the State of New Mexico for the administration, operation, and maintenance of the authorized recreational facilities. The first lease was executed in 1964 and the

second in 1973.[3] Under the lease agreements, the Federal Defendants assigned to the State Defendants the right to revenues generated from Project lands. The lands encompassed by the lease agreement with the State Defendants historically constituted grazing and farm lands of the Rio Grande Project, and the Project was historically credited with the "net profits" from these lands.

Plaintiffs assert that 76 Stat. 171 did not authorize Federal Defendants to transfer *existing* revenue producing leases to the State of New Mexico. According to Plaintiffs, revenues previously credited to the Project are now turned over to the State of New Mexico. Plaintiffs' Response as to Count II at 6. Because they are entitled to revenues generated from Project lands pursuant to Subsection I of the Fact Finder's Act, Plaintiffs claim Federal Defendants did not have statutory authority to assign Rio Grande Project land revenues to the State Defendants in the 1973 Lease Agreement.[4] Plaintiffs request the Court

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[3] The Parties entered into the 1964 and 1973 contracts pursuant to the Reclamation Act of 1902, 32 Stat. 388 and the Act of July 25, 1962, Pub.L. 87-542, 76 Stat. 171.

[4] In its September 3, 1992 Memorandum opinion and Order, the Court found Plaintiffs were entitled to receive credits from revenues generated from Project lands under Subsection I. Subsection I of the Fact Finder's Act of 1924 mandates that "the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites, shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct." 43 U.S.C. § 501

declare the lease ultra vires and void or in the alternative, that the lease be reformed to provide the Plaintiffs with revenue credits as mandated by Subsection I of the Fact Finder's Act.

The Court will first address the Defendants' argument that the statute of limitations bars Count II as to the Federal Defendants pursuant to 28 U.S.C. § 2401. Section 2401 provides that:

> . . . every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The six year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and must be strictly construed. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988).

"It is generally stated that a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the Plaintiff to institute an action." *Id.* at 1577. For the purposes of § 2501, "a cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Id.*

In response to Federal Defendants' statute of limitations argument, Plaintiffs contend the "continuing claim" doctrine is applicable to this action. On October 29, 1990, Plaintiffs filed amended pleadings to assert claims only for prospective relief, in the form of reformation of the

current 50 year lease with the State Defendants, and for accountings and credits against operation and maintenance charges which accrued after January 25, 1984, six years prior to the filing of the Complaint. Under the continuing claim doctrine, these claims for the resulting damages occurring within six years prior to the filing of the complaint would not be barred by § 2501.

Under the continuing claim doctrine, where payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought, even where the grounds or basis for the refusal to pay took place or were enacted more than six years prior to the action. *Friedman v. United States*, 310 F.2d 381, 385, 159 Ct.Cl. 1 (1962); *see also, Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988) (unlawful termination of tribe's status could result in certain injuries which fall within the continuing claim doctrine sufficient to remove claims for the resulting damages occurring within six years of the complaint from the bar of § 2501). "The rationale underlying the continuing claim doctrine is that it prevents the defendant from escaping all liability for its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress in section 2501." *Hopland*, 855 F.2d at 1581.

In this case, the Districts' rights are to annual credits against operation and maintenance charges from net revenues generated from Project lands pursuant to Subsection I of the Fact Finder's Act. The Court finds the continuing claim doctrine applicable. Therefore, claims which accrued within six years prior to the filing of the Complaint are timely.

State Defendants also claim Count II is barred by the statute of limitations. However, the Court previously rejected State Defendants' statute of limitations and laches arguments at the October 19, 1990 hearing. The Court entered an order on the same day denying State Defendants' Motion for Summary Judgment.

Defendants next contend Congress intended to provide recreational facilities at water projects and these facilities could not operate without the revenues they now receive. Citing the Act of July 25, 1962, Pub.L. 87-542, 76 Stat. 171, and the Federal Water Project Recreation Act ("Recreation Act"), Pub.L. 89-72, 16 U.S.C. § 4601-12, Defendants contend "Congress has the authority to affect revenues in subsequent acts" and "to establish a policy favoring recreational use of water projects." Defendants further argue the Act of July 25, 1962 and the Recreation Act authorized a new use of the federal land, i.e., recreation. According to Defendants, this new land use also created a new revenue stream from recreational activities that did not exist at the time the Fact Finder's Act was enacted. Pursuant to the Recreation Act, Congress directed that the revenue from this new use be deposited into the Treasury and not to the Districts. In this case, Defendants claim that any revenues received by the Bureau of Reclamation (BOR) pursuant to the lease with the State are now required by law to be deposited into the Treasury as miscellaneous receipts. However, under the lease with the State, the BOR receives no revenues but requires the State use any excess fees for improvements and operations of Elephant Butte and Caballo State Parks. Simply stated, Defendants argue the

Act of July 24, 1962 and the Recreation Act, by implication, modified Plaintiffs' rights to Subsection I credits.

The Court has reviewed the Act of July 25, 1962 and the Recreation Act and finds nothing in those Acts modified Plaintiffs' right to Subsection I credits. The Act of July 25, 1962 explicitly states in pertinent part:

> That the Secretary of the Interior is authorized and directed to investigate, plan, construct, operate, and maintain basic recreation facilities at Elephant Butte and Caballo Reservoirs, Rio Grande Federal reclamation project, New Mexico . . . and to provide for the public use and enjoyment of such recreation facilities and the water areas of such reservoirs in such manner as is consistent with the *primary purpose* of such project. (Emphasis added).

76 Stat. 171, § 2. This express language recognizes the primary purpose of the Rio Grande Project was not to be adversely affected by 76 Stat. 171. Contrary to Defendants' contention, that in enacting 76 Stat. 171 Congress intended to establish a policy favoring recreational use of water projects, the reading of this Act indicates the primary purpose of the project was irrigation and not recreation and this primary purpose was not to be adversely affected. *See also, Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) (construing similar language, "consistent with the primary purpose" in a reclamation project and finding recreation not a primary purpose).

In construing the relationship between the Recreation Act and Subsection I of the Fact Finder's Act, the Commissioner of Reclamation issued a memorandum on February 28, 1967, and opined that Subsection I was

unaffected by the Recreation Act. The commissioner stated in pertinent part:

> The above interpretation of the relationship between Subsection I and section 2(a) of P.L. 88-578 preserves contract rights by viewing recreation revenues as lease revenues from project grazing and farm lands, even if the contract does not expressly refer to recreation revenues as lease revenues. Under the interpretation any kind of revenue from project grazing and farm land is viewed as protected.
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> * * *
>
> Rights in revenues preserved by contracts would pertain whether or not the lands were retained in the jurisdiction of the Bureau of Reclamation or transferred to another agency such as the Forest Service. *The amount of revenue which should be set aside for meeting the contractual commitment should be equivalent to what had been available when the land was under grazing or farm lease.* To apply to the contract additional revenue generated by recreational development undertaken with appropriated funds would constitute, in our opinion, an unauthorized gift of federal property. (Emphasis added).

For the foregoing reasons, the Court finds that the Districts are entitled to continue receiving Subsection I credits, at least credits equivalent to what they were previously entitled to prior to the development of the recreational facilities. However, the Court also recognizes the State's need to continue to receive funds to administer, operate, and maintain the recreational facilities.

Accordingly, Defendants' Joint Motion for Partial Summary Judgment is denied and Plaintiffs' Motion for Partial Summary Judgment is granted. The Court will set a hearing to reform the lease to provide the Plaintiffs with revenue credits as mandated by Subsection I of the Fact Finder's Act.

III. Defendants' Motion for Summary Judgment as to Count VI

Count VI of the Districts' Amended Complaint seeks an order terminating the current memorandum of understanding ("MOU") between the BOR and the Bureau of Land Management ("BLM"). Since the 1940s, the BOR and BLM entered into a MOU concerning administration of lands for grazing purposes around Elephant Butte and Caballo Reservoirs.

The original 1941 MOU covered only lands around Caballo Reservoir and provided for BLM to charge grazing fees at least equal to the rate charged on adjacent grazing lands administered by BLM under the Taylor Grazing Act and recognized that for the most part the lands were similar in character for grazing purposes. The 1941 MOU also provided for the BLM to collect all grazing fees and pay them over to BOR for disposal under reclamation law. In 1949, the lands around Elephant Butte Reservoir were added to the MOU.

In 1942, the grazing fees for use of both BLM and BOR lands were agreed to be identical. In 1972, the BLM and BOR entered into a national MOU that provided for deposit of all grazing fee collections on reclamation lands

to be deposited in the Treasury for credit to the loan repayment account for the project.

In 1976, Congress enacted the Federal Land Policy and Management Act ("FLPMA") which required the development of allotment management plans to improve range conditions and better resources. See 43 U.S.C. § 1752(d). Because BOR does not have any expertise in developing such plans and because BLM has extensive experience in the techniques, costs and goals of range-land management, in 1983, the BLM and BOR entered into a revised national MOU which provided reimbursement by each agency for services rendered. With respect to grazing, the 1983 MOU stated:

> When authorized by Reclamation, revenues or fees collected may remain with BLM to serve as Reclamation's reimbursement for work performed.

The BOR and the BLM entered into the current MOU on November 17, 1987. The 1987 MOU authorized BLM to use a portion of the revenues collected from grazing fees to offset administrative costs incurred with respect to such lands and to make range improvements on these lands.[5] BLM also is authorized to lease out and manage

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[5] The 1987 MOU states in pertinent part:

> The BLM shall be responsible for collecting revenues from grazing leases on Project lands and transferring appropriate funds into proper accounts according to Federal laws and regulations. A portion of these collected revenues shall be used by BLM for administration of grazing on Project lands and for construction and maintenance of improvements,

the BOR lands. 43 C.F.R. Part 4100. Grazing fees are set by Executive Order under the guidance of Section 401 of the FLPMA, now codified as 43 U.S.C. § 1751, Section 6 of the Public Rangelands Improvement Act, now codified as 43 U.S.C. § 1901, et seq., and BLM's regulations at 43 C.F.R. § 4130.7-1. Under the Economy Act, BLM is entitled to recover its costs of administration from the lease revenues it collects on behalf of BOR. According to Federal Defendants, if the Court were to terminate the MOU, BOR would incur the cost of administration and the cost would likely be higher. Moreover, Defendants claim because management costs are now being deducted from the gross lease receipts there is little or no "net profit" to credit to the Districts under the provisions of Subsection I of the Fact Finder's Act of 1924.[6]

Plaintiffs assert the current management arrangement between the BLM and BOR regarding Rio Grande Project lands is not in their best interest. Plaintiffs contend Federal Defendants have breached their fiduciary duties because the arrangement with BLM generates little if any profit from the grazing lands for crediting to the Plaintiffs' operation and maintenance expenses of the Project.

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including those requested by Bureau of Reclamation on Project lands.

[6] Pursuant to Subsection I of the Fact Finder's Act, the Federal Defendants are required to credit net profits generated from Project grazing and farm lands on an annual basis toward the Plaintiffs' operation and maintenance expenses of the Project.

Plaintiffs cite *United States v. Mitchell*, 463 U.S. 206 (1983), in support of their claim that a fiduciary relationship exists between the Secretary and the Districts. However, *Mitchell* involved a federally recognized Indian Tribe. In *Mitchell*, the Court recognized the "undisputed existence of a general trust relationship between the United States and the Indian people," and emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Mitchell*, 463 U.S. at 225. Although Plaintiffs are entitled to Subsection I credits under Fact Finder's Act, this alone is not a legal basis upon which the Court can conclude that a fiduciary relationship exists between the District and the United States.

Plaintiffs also contend "the Secretary owes fiduciary duties to them under Subsection I of the Fact Finder's Act." Plaintiffs' Response as to Count IV at 6. However, Subsection I only directs how the revenues from Project lands are to be disposed. It does not create a fiduciary duty to the Districts.

Plaintiffs further assert the Secretary has a duty to generate profits pursuant to Subsection I. According to Plaintiffs, proper management of Project lands would require competitive bidding of grazing charges. However, according to Mr. Miles Brown, the BLM official in charge of administration of the grazing leases, competitive bidding would not bring greater revenues than are now being generated. Defendants' Reply as to Count VI, Exhibit B, pp. 111-116.

The Reclamation Act of 1902 grants the Secretary of Interior broad authority "to perform any and all acts and

to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." 43 U.S.C. § 373. Management of Project lands falls within this authority and are matters completely within the Secretary's discretion. *Cf., Baca v. King*, 92 F.3d 1031, 1037 (10th Cir. 1996) (no court has the power to order the BLM or the Department of Interior to grant a grazing lease; determination of whether public lands should even be designated for grazing purposes are matters completely within Secretary's discretion). The Court has no authority to require the Secretary to employ competitive bidding of grazing charges or to turn over management of the Project lands to the Districts.

Finally, although the Court finds that Plaintiffs are entitled to Subsection I credits under the MOU, Plaintiffs concede that no profits are being generated under the current management plan. In fact, Defendants assert the only reason the Districts had been receiving grazing revenues in the past was because BOR and BLM had not been charging administration costs or the costs of range improvement to the Districts. Plaintiffs have not disputed this assertion. The Court finds that the Districts have not demonstrated the terms of the MOU are arbitrary, capricious or contrary to law. Therefore, Federal Defendants' Motion for Summary Judgment as to Count VI is granted.

NOW, THEREFORE,

IT IS HEREBY ORDERED that Plaintiffs,' Motion for Partial Summary Judgment as to Count II is granted. Defendants' Joint Motion for Partial Summary Judgment as to Count II is denied.

IT IS FURTHER ORDERED that Federal Defendants' Motion for Summary Judgment as to Count V is granted.

IT IS FURTHER ORDERED that Federal Defendants Motion for Summary Judgment as to Count VI is granted.

/s/ Howard C. Bratton
HOWARD C. BRATTON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEPHANT BUTTE IRRIGATION
DISTRICT OF NEW MEXICO, et al.,

Plaintiffs,

vs. Civ. No. 90-095-HB

UNITED STATES DEPARTMENT OF
THE INTERIOR, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Sep. 16, 1993)

(Entered On Docket 9/16/93)

This matter is before the Court on State Defendants' Motion to Dismiss Plaintiffs' Amended Complaint as against the State Defendants pursuant to Fed. R. Civ. P. 12(b)(6).[1] As grounds for their Motion to Dismiss, State Defendants assert immunity under the Eleventh Amendment. Having reviewed the motion, the memoranda of the parties, the applicable law, and being otherwise fully

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[1] In *Edelman v. Jordan*, 415 U.S. 651, 677-678 (1974), the Court concluded that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."); *see also, Green v. Mansour*, 474 U.S. 64, 68 (1985) ("The Eleventh Amendment confirms that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."). Therefore, the Court construes this as a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

advised in the premises, the Court finds that the motion should be granted in part and denied in part.[2]

State Defendants contend that *all* State defendants are entitled to Eleventh Amendment immunity from suit. The Court disagrees. In the absence of consent, the Eleventh Amendment bars suits against the State or one of its agencies or departments.[3] *Papasan v. Allain*, 478 U.S. 265, 276 (1986). This bar exists whether the relief sought is legal or equitable. *Id.* However, under the doctrine of *Ex parte Young*, 209 U.S. 123, 159 (1908), the Eleventh Amendment does not bar suits against state officers to enjoin violations of federal law. In this case, Plaintiffs assert a continuing violation of federal law by the State Defendants. Thus, the state officials are not entitled to Eleventh Amendment immunity and will not be dismissed. Plaintiffs also list the State of New Mexico and the Department of Energy, Minerals and Natural Resources, a state agency, as defendants. A suit against these defendants is barred by the Eleventh Amendment. Therefore, these defendants will be dismissed.

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[2] State Defendants request the Court consider Plaintiff El Paso County Water Improvement District No. 1 of Texas' failure to respond to their Motion to Dismiss as consent by that Plaintiff to grant their motion pursuant to Local Rules 7.5 and 7.8. The Court will deny this request. Plaintiff EBID filed their Response to State Defendants' Motion to Dismiss on behalf of both Plaintiffs. Plaintiffs' Counter-Motion for Rule 11 Sanctions also is denied.

[3] Although a State may consent to be sued in federal court, in this case, New Mexico has expressly declined such consent.

State Defendants also contend that the relief requested by Plaintiffs is barred by the Eleventh Amendment. In *Papasan*, the Supreme Court described the types of cases that formally meet the *Ex parte Young* requirements of a state official acting inconsistently with federal law:

> *Young's* applicability has been tailored to conform as precisely as possible to those specific situations in which it is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.' " (citations omitted). Consequently, *Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past, as well as cases in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law through deterrence or directly to meet third-party interests such as compensation. Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the official is the named defendant. Relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury. (citations omitted).

478 U.S. at 278. Count II of Plaintiffs' Amended Complaint requests the following relief:

A) For a declaratory judgment setting forth the rights of the Plaintiff and EP#1 vis-a-vis the rights of the Federal Defendants and the State Defendants to the prospective rights to revenues generated from project lands at Elephant Butte Reservoir and Caballo Reservoir;

B) For an order declaring the lease agreement with the State of New Mexico void as an ultra vires act and as unconscionable, or, alternatively, for reformation of the lease contract in equity to require prospective compliance with Federal Law by providing revenues to the Project beneficiaries as called for in Subsection I of the Fact Finder's Act;

C) For an accounting of all revenues generated by the lease agreement by the State Defendants to the Federal Defendants of said funds so that the Project beneficiaries may be properly credited under Subsection I of the Fact Finder's Act;

D) In the alternative, for a finding that the 1937 contract has become substantially incapable of performance due to the acts of the Federal Defendants and as such that pursuant to the 1937 contract that said contract be declared void and the parties returned to their status quo ante; and

E) For an order giving Plaintiff credit for any excess revenues that State Defendants have generated from Project lands to which Plaintiff is lawfully entitled to credit.

Count II (A)[5] and (B) are exactly the types of relief allowed under the *Ex parte Young* doctrine. Plaintiffs'

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[5] State Defendants assert that section (A) of Plaintiffs' Prayer for Relief in Count II is moot. State Defendants rely on

prayer for declaratory judgment falls into the category of actions seeking prospective relief. *See Green v. Mansour*, 474 U.S. 64 (1985).[6] Plaintiffs are not asking for past revenues generated by project lands, rather, they ask for a declaration as to whether State Defendants' conduct amounts to a continuing violation of Subsection I of the Fact Finder's Act and for prospective compliance with that federal law. Therefore, Count II (A) and (B) of Plaintiffs' Amended Complaint will not be dismissed. However, Count II (D) of Plaintiffs' Amended Complaint is relief that does not impact the State Defendants' rights

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the following statement of this Court's **Memorandum Opinion and Order,** page 5, filed September 3, 1992: "Hayden-O'Mahoney also removes the possibility, implied in the final sentence of Subsection I, that once the water users had paid off all their obligations to the federal government, net profits could be distributed to the water users directly." However, on page 5 of the **Memorandum Opinion and Order,** the Court also stated that "nothing in Hayden-O'Mahoney 'clearly and manifestly' changes other Subsection I provisions that certain other net revenues should be credited to the water users' obligations after they take over the care, operation, and maintenance of their project or division." Thus, although Plaintiffs cannot receive Subsection I revenues directly, they are entitled to have "other net revenues" credited to their obligations.

[6] In *Mansour*, the Supreme Court addressed the question of whether federal courts may issue a declaratory judgment that state officials violated federal law in the past when there was no ongoing violation of federal law. The Court found the issuance of a declaratory judgment improper because there was no claimed continuing violation of federal law and therefore no occasion to issue an injunction. 474 U.S. at 72-74. Unlike the Plaintiffs in *Mansour*, Plaintiffs in the case at bar are claiming an ongoing violation of federal law.

and will be dismissed. Finally, a decision on State Defendants' Motion to Dismiss Plaintiffs' Counts II (C) and (E) shall be reserved pending further rulings by this Court.

NOW THEREFORE,

IT IS HEREBY ORDERED that State Defendants' Motion to Dismiss the State of New Mexico and the Department of Energy, Minerals and Natural Resources is granted.

IT IS FURTHER ORDERED that State Defendants' Motion to Dismiss Secretary Anita Lockwood. and the Governor of the State of New Mexico is denied.

IT IS FURTHER ORDERED that Count II (D) of Plaintiffs' Amended Complaint is dismissed.

IT IS FURTHER ORDERED that Plaintiffs' Counter-Motion for Rule 11 Sanctions is denied.

/s/ Howard C. Bratton
HOWARD C. BRATTON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO, EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, OF TEXAS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; et al.,

Defendants.

CIV.90-0095-HB

MEMORANDUM OPINION AND ORDER

(Filed Sept. 3, 1992)

This matter is before the Court on cross-motions for partial summary judgment submitted by the plaintiffs and the federal defendants. After hearing oral argument by the parties on April 9, 1992, and reading the memoranda and exhibits submitted by the parties, and being fully familiar with the applicable law, the Court finds that the plaintiffs' motion is well-taken and should be granted and the federal defendants' motion is not well-taken and should be denied.

In these cross-motions, the parties ask the Court to decide whether plaintiffs are entitled to credit for certain revenues collected by the Bureau of Reclamation in accordance with 43 U.S.C. § 501 (1924), also known as Subsection I of the Factfinder's Act of 1924. Subsection I provides:

> Whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid.

In 1979, Elephant Butte Irrigation District (EBID) took over the care, operation, and maintenance of its portion of the Rio Grande Project, and in 1980 El Paso County Water Improvement District No. 1 (El Paso) took over the care, operation and maintenance of its portion of the Rio Grande Project. Under the terms of Subsection 1, once EBID and El Paso took of [sic] the care, operation, and maintenance of their respective divisions of the project, they were entitled to receive credit for the total accumulated net profits "derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites."[1]

Under the terms of Subsection I, these net profits should have been applied at the time of takeover as a

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[1] How these credits should be divided between the two sections of the Project is beyond the scope of this opinion.

credit to the construction charge of the project.[2] However, prior to takeover, in 1971 and 1975 respectively, EBID and El Paso made their final payments on their construction obligations. Accordingly, after takeover, the statute mandates that net profits be credited annually "second, on account of project operation and maintenance charge, and third, as the water users may direct."

The federal defendants claim that 43 U.S.C. § 392(a) (1938), known as the Hayden-O'Mahoney amendment,[3] terminated plaintiffs' entitlement to Subsection I revenues. The Hayden-O'Mahoney Amendment provides:

> All moneys received by the United States in connection with any irrigation projects, including the incidental power features thereof, constructed by the Secretary of the Interior through the Bureau of Reclamation, and financed in whole or in part with moneys heretofore or hereafter appropriated or allocated therefor by the Federal Government, shall be covered into the reclamation fund, except in cases where provision has been made by law or contract for the use of such revenues for the benefit of users of water from such project: *Provided*, That after the net revenues derived from the sale of power

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[2] The plaintiffs argue they were entitled to Subsection I credit before takeover as a result of the omnibus Adjustment Act of 1926. Although that Act may have given the Secretary discretion to remove the pre-condition that the water users take over the care, operation and maintenance of the projects, the plaintiffs have submitted no documentation showing that any Secretary ever exercised his discretion in that regard.

[3] This was an amendment, proposed by Mr. Hayden, Senator from Arizona, and Mr. O'Mahoney, Senator from Wyoming, to the 1939 Interior Department appropriations bill.

> developed in connection with any of said projects shall have repaid those construction costs of such project allocated to power to be repaid by power revenues therefrom and shall no longer be required to meet the contractual obligations of the United States, then said net revenues derived from the sale of power developed in connection with such project shall, after the close of each fiscal year, be transferred to and covered into the General Treasury as "miscellaneous receipts" . . .

The federal defendants maintain that this statute, by implication, repealed or modified Subsection I except that the terms of Subsection I would continue to be applied to projects having a contract specifically referring to Subsection I or where Congress had enacted special legislation for the benefit of a particular project. They also argue that the Court should adopt this interpretation of Hayden-O'Mahoney because it is a long-standing one by the Bureau of Reclamation, the agency charged with the administration of the reclamation laws.

Plaintiffs counter with three arguments. First, they cite to the maxim that courts do not favor repeal by implication. Second, they contend there is no long-standing interpretation by the Bureau supporting the federal defendants' position. On the contrary, they submit documentation indicating employees of the Bureau of Reclamation have consistently indicated to them they are entitled to Subsection I revenues. Third, they believe they have contracts with the Bureau preserving their rights to Subsection I revenues, even if Hayden-O'Mahoney would have otherwise stripped them of those rights. The Court agrees in part with plaintiffs' arguments and ultimately

concludes the districts are entitled to some of the benefits of Subsection I.

In reiterating that "the repeal of a statute by implication is not favored," the Tenth Circuit synthesized a framework for the examination of a claim that Congress has repealed an earlier statute. *Yellowfish v. City of Stillwater*, 691 F.2d 926, 928 (10th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983).

> There are two well accepted categories of repeal by implication: '(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.' In either situation, legislative history and congressional intent are important factors, but the intent of the legislature must be "clear and manifest" to uphold an implied repeal.

Id. (citations omitted.)

The Court has carefully read both statutes, compared them, and has read the legislative history surrounding the enactment of the Hayden-O'Mahoney amendment. It is clear from a reading of the two statutes there are two obvious conflicts between the statutes and that Hayden-O'Mahoney is a repeal or modification to the extent of those conflicts. Hayden-O'Mahoney modified Subsection I to the extent that once water users of a particular project have repaid construction costs advanced by the federal government and allocated to power, net revenues thereafter derived from the sale of power were no longer to

remain in the reclamation fund to be credited to the project under Subsection I, but would be deposited into the General Treasury. Hayden-O'Mahoney also removes the possibility, implied in the final sentence of Subsection I, that once the water users had paid off all their obligations to the federal government, net profits could be distributed to the water users directly. However, nothing in Hayden-O'Mahoney "clearly and manifestly" changes other Subsection I provisions that certain other net revenues should be credited to the water users' obligations after they take over the care, operation, and maintenance of their project or division.

The legislative history supports this interpretation. The overriding purpose of the Hayden-O'Mahoney amendment was to increase the size of the reclamation fund. *See generally* 83 Cong. Rec. 4727-35, 5809-17 (1938). A portion of a letter read into the record states the problem the amendment proposed to rectify:

> Any comment on H.R. 10120 must include a statement that there is serious need for revenues to supplement the reclamation fund.
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> In the beginning the reclamation fund was set up to receive a portion of the receipts from the sale of public lands.[4] At that time the public lands were moving rapidly under the homestead law and it was apparently believed that their sale would provide a constant source of accretions to the reclamation fund. Since repayments made by project water users also were covered into the reclamation fund, it was believed that as this fund revolved, and was fed

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[4] *See* 43 U.S.C. § 391 (1902).

by accretions, an adequate construction program could be financed on a continuing basis solely from the reclamation fund. There were two flaws in the original plan. One was that the era of sales of large amounts of public lands was drawing to a close. Accretions to the reclamation fund from that source reached a peak of more that $9,000,000 but have declined steadily for 30 years. Last year they amounted to only a little more than $125,000, and they will not again increase in the future. The other flaw was that the Reclamation Act originally required repayment of the cost of the projects in 10 years, despite the fact that at that time outstanding private irrigation bonds bore maturity dates from 35 to 40 years. It is not illogical to grant so long a term, since irrigation projects are permanent improvements and did not depreciate in value rapidly, if at all.

By 1920 the Congress began to cast about for means of supplementing the reclamation fund. Since than [sic] a portion of the receipts from royalties from oil on public lands, from royalties on minerals on the public lands, from power-site licenses, etc.,[5] have been placed by law in the reclamation fund. These have not provided an adequate substitute for the receipts from the sale of public lands.

83 Cong. Rec. 5815 (1938).

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[5] Proceeds from the leasing of lands withdrawn under reclamation law or necessary for the operation of reclamation projects were also covered into the reclamation fund. 43 U.S.C. § 394 (1919).

The Secretary of the Interior states the more specific purposes of the amendment in the following paragraph:

> H.R. 10120 would accomplish two purposes. It would transfer a portion of the receipts from royalties on oil from naval petroleum reserves to the reclamation fund[6] and it would cover into the reclamation fund repayments of project costs by water and power users, with certain exceptions to avoid conflict with existing contracts and special legislation, on all Federal reclamation projects, regardless of the original source of funds expended in the construction.

Id.

Finally, the Secretary's letter describes the function of Section 3 of the amendment, the portion federal defendants claim repeals or modifies Subsection 1:

> Section 3 of the bill provides that all the moneys received by the United States in repayment of construction costs in connection with any irrigation project of the Bureau of Reclamation, with the exceptions noted above, shall be covered into the reclamation fund. involved here are collections to be made in connection with the Federal irrigation projects begun or continued with allotments by the Public Works Administration, with allotments from the Emergency Relief Acts of 1935 and 1937, and with appropriations direct from the General Treasury.

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[6] This section of the amendment is codified at 43 U.S.C. § 391a-1, and it was this section that sparked much of the debate on the amendment. *See generally* 83 Cong. Rec. 4727-35.

Id. It is clear from the above excerpts that the Hayden-O'Mahoney amendment was designed to *increase the* reclamation fund, perhaps at the expense of the General Treasury,[7] but not at the expense of the water users, except with regard to power revenues. Moreover, in this section of his letter, the Secretary mentions only that "moneys received by the United States in repayment of construction costs" are affected by the amendment; he does not mention miscellaneous revenues, such as those covered by Subsection I.

In fact, the only specific reference to Subsection I in the legislative history appears in the Secretary's letter when he describes the savings clause, but again, only in reference to power revenues.

> Language in section 3 [43 U.S.C. § 392a] also exempts power revenues now covered by contractual arrangements between the United States and water users on operating projects, so as not to disturb those contracts. These exceptions are adequate and necessary safeguards for . . . the water users. . . . I recommend, however, that, following the word 'fund,' . . . there be inserted

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[7] One commentator stated:

> A principal reason for [the reclamation fund's] large annual income is that repayment of construction costs financed out of the general Treasury revenues – as they have so largely been in recent decades – is required to be made to the reclamation fund rather than to the Treasury. Thus funds borrowed from the Treasury are repaid to the reclamation fund, inaugurating what one observer, not kindly, called "something new in financing." 2 Clyde, et al., *Water and Water Rights* § 111.1, at 131 (Clark, ed. 1967).

> the following: 'except in cases where provision has been made by law or contract for the use of such revenues for the benefit of users of water from such projects.' There are several projects on which the water users or their organizations have undertaken the repayment of the costs of incidental power developments and have contracts under subsection I of section 4 of the act of December 5, 1924 (43 Stat. 672, 703), respecting the disposition of net power revenues.

83 Cong. Rec. 5815; *see, also* 83 Cong. Rec. 4832-33.

In 1937, both EBID and El Paso contracted with the Bureau of Reclamation to relinquish their interests in developing hydroelectric power in the Rio Grande Project in return for a credit against their outstanding construction costs. In the contracts, the districts also specifically gave up their rights to power revenues. The federal defendants claim the districts also intended to give up all their rights under Subsection I. They also argue that, although the Hayden-O'Mahoney amendment repealed or modified Subsection I, had the districts incorporated a specific plan for the distribution of Subsection I revenues in the 1937 contract, the savings clause would have applied.

First, the districts did not give up any rights under Subsection I except those relating to power. Article 4 specifically and unambiguously provides that "the District desires to receive . . . the benefits of the provisions of other acts of Congress relating to the repayment of charges." Subsection I is an act "relating to the repayment of charges." Article 22 specifically and unambiguously provides that "the consideration hereof running to the

District is the benefit conferred under . . . the Acts of December 5, 1924 and May 25, 1926. Subsection I was a section of the "Act of December 5, 1924."

Second, at the time the 1937 contracts were drafted there was no need to incorporate a specific repayment plan for non-power Subsection I revenues. The districts had not yet taken over the care, operation, or maintenance of their divisions, nor could they have foreseen the Hayden-O'Mahoney amendment or the future interpretation of that amendment by the federal defendants.

Finally, since the Hayden-O'Mahoney amendment did not repeal Subsection I, it is immaterial whether or not the savings clause applies. The federal defendants misinterpret the meaning of the savings clause. The Secretary intended the clause to allow those districts "with existing contracts and special legislation," 83 Cong. Rec. 5815 (letter from Secretary of the Interior), to escape the effects of the amendment as it related to power revenues. These districts were "projects on which the water users or their organizations ha[d] undertaken the repayment of the costs of incidental power developments and ha[d] contract's, under subsection I . . . , respecting the disposition of net power revenues." *Id.* This supports the Court's finding that Hayden-O'Mahoney did not completely repeal Subsection I. If it had, the Secretary would not have qualified his statement as to the particular type of contracts under Subsection I, those applying to power revenues, that would be saved by the clause.

In sum, Subsection I was not repealed by the Hayden-O'Mahoney amendment. The plaintiffs did not agree to give up their Subsection I benefits, other than their

right to power revenues, in the 1937 contracts. And the plaintiffs were not required to incorporate specific references to those Subsection I benefits in order to retain them after the enactment of the Hayden-O'Mahoney amendment.

The federal defendants also ask the Court to defer to the Bureau of Reclamation's long-standing interpretation of the reclamation laws, an interpretation defendants maintain supports their position herein. This Court must defer to an agency's reasonable interpretation of a statute where, as here, Congress has not clearly articulated its intent on the issue. *Chevron, USA. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). In this case, however, the agency has not interpreted the statutes in relation to plaintiffs' entitlement to Subsection I revenues in any reasonably consistent manner prior to the instigation of this lawsuit.

The defendants submitted several solicitor's opinions in support of their position. However, all the opinions address other projects and other sorts of revenues. Exhibit SSS, a 1944 solicitor's opinion, refers to the Grand Valley Project's receipt of net power revenues. Exhibit UUU, a 1950 solicitor's opinion, refers to the Strawberry Valley Project and the interplay between oil and gas leases, Indian lands, and the Mineral Leasing Act for Acquired Lands, with no mention of the Hayden-O'Mahoney amendment. Exhibit VVV, a 1972 solicitor's opinion, also concerning the Strawberry Valley Project, states that a pre-existing contract preserves the water users' rights to power revenues despite the Hayden-O'Mahoney amendment. The opinion also states that Subsection I revenues may not be distributed directly to the

water users but that these revenues may be applied to project purposes under subsection I. Exhibit WWW, a 1978 solicitor's opinion refers to groundwater revenues, not Subsection I revenues.

Exhibit XXX, a 1989 solicitor's opinion regarding disbursement and crediting of mineral leasing revenues from acquired lands, supports defendants' position but does not address the Rio Grande Project. The opinion states the Hayden-O'Mahoney amendment prohibits the Bureau from entering into a contract for the receipt of Subsection I benefits. Utilizing the legislative history, the solicitor writes that the Factfinder's Act was enacted to help the needy farmers at the time, and the Hayden-O'Mahoney amendment was enacted to help the reclamation fund, and implies Congress must have believed the farmers no longer needed aid. The solicitor refers to Subsection I as "a unique situation not repeated again in reclamation law and specifically disfavored in the Hayden-O'Mahoney Amendment." He concludes that because Subsection I and related statutes do still exist and have not been repealed, the Bureau is obligated to credit revenues to the projects but only to past or future construction charges and not to relieve water users of their statutory obligation to pay operation and maintenance charges.[8]

The Court disagrees that the legislative history surrounding the Hayden-O'Mahoney amendment indicates Congress no longer wanted to help the water users. As noted previously in this opinion, if any particular entity

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[8] *See* 43 U.S.C. § 492 (1914).

or group fared poorly as a result of the amendment, it was the General Treasury or projects which may have desired the full Subsection I benefit from power revenues. Also, there is no justification for the solicitor's conclusion that water users may still retain a credit to their construction charges but not to their operation and maintenance charges. The reclamation fund is to be used "for the construction and maintenance of irrigation works." 43 U.S.C. § 391. Water users are responsible for paying both obligations, although the construction debt may be finite and maintenance charges are to be paid yearly and sometimes in advance. *See* 2 Clyde, et al., *Water and Water Rights* § 110.2, at 121 (Clark, ed. 1967) and 43 U.S.C. § 493. The government funds expenses for both construction and maintenance from the reclamation fund; thus any increase in the fund as a result of the Hayden-O'Mahoney amendment would benefit either the construction or maintenance debt. Thus, water users should be able to apply their credits to either construction or operation and maintenance as the statutes require. Finally, the plain language of the statutes, Subsection I and the Hayden-O'Mahoney amendment, does not support a distinction between credit to construction charges and credit to operation and maintenance.

The parties have submitted several documents in which Bureau officials told EBID Subsection I revenues were available to be used as a credit to non-construction charges. In 1953, the Regional Director wrote he had "no reason but to assume that proper and equitable distribution of such profits [from rental revenues] shall be made to the water users." In 1979, the Regional Director wrote that revenue from grazing and leasing permits should

have been made available to the district as per Subsection I. However, in 1972 the Acting Associate Solicitor advised the Field Solicitor, who in turn advised the Regional Director, that Subsection I revenues would be available to the district as credit to operation and maintenance charges only after it took over the care, operation and maintenance of its project, but that these revenues would have to be appropriated by Congress.[9]

In *Chevron*, the Supreme Court reasoned the courts must defer to reasonable interpretations of statutes made by an administrator of an agency empowered to administer a congressionally created program. 467 U.S. at 843-44. Because there has been no consistent interpretation, rule, or regulation developed by the Bureau on this issue, the Court is not required to defer to its position herein.

The federal defendants also argue that even if the plaintiffs are entitled to Subsection I benefits, they are only entitled to revenues from lands south of Caballo reservoir. The defendants draw this line for three reasons. First, they maintain that wording in the 1937 contract entitles plaintiffs only to revenues below this line. Second, they claim the plaintiffs have not taken over care, operation, and maintenance of the "storage division" of the project, and because the "storage division" includes all the land above this line, they are not entitled to

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[9] These two internal memoranda contain the only references before the Court to the Rio Grande Project and the Hayden-O'Mahoney amendment. However, they were never presented to the Districts and were themselves contradicted by Bureau correspondence issued after 1979, when the Districts took over operation and maintenance.

Subsection I revenues from that land. Finally, they argue that the plaintiffs never paid for the construction of either Elephant Butte Dam or Caballo Dam and therefore are not entitled to revenue from the lands adjacent to the reservoirs. There is no justification for any of these arguments.

In the 1937 contracts the plaintiffs agreed to convey all their interests in the development of hydroelectric energy to the United States. In return, the United States relieved them of their obligation to reimburse the government for construction costs of the storage system (defined as Elephant Butte Dam and Reservoir and appurtenant works) chargeable to the development of power. Article 18 of the 1937 contract provided:

> That the net earnings of the power plant and system belonging to the United States and any other available revenues accruing to the United States by reason of Government ownership of the power plant and system[10] shall be applied in accordance with the provisions of the item in the Interior Department Appropriation Act, fiscal year 1938, as set out in Article 3 Hereof [sic].

Article 3 sets out in full the enabling statute that set the stage for the 1937 contracts. It states that the power revenues must be applied to "(1) the costs of power facilities, (2) the amount invested . . . in the cost of Elephant Butte Dam, and (3) the amount invested by the Bureau of Reclamation in Caballo Dam," and that after these costs have been met, "the net earnings of the power

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[10] The contracts define "Power system" as "Power plants, trnasmission [sic] lines, etc., constructed for development of power."

plant and system shall be disposed of as Congress may direct."

The contract is clear and unambiguous. Revenues accruing to the United States from the power system – power plants, transmission lines, and other facilities constructed for the development of power – were to be applied to offset the cost of the power facilities and the amounts invested by the United States in Elephant Butte and Caballo Dams. Other Subsection I revenues, that is, revenues from grazing lands, etc., are not revenues accruing from the power system, and should not be accruing to the United States under the terms of the 1937 contracts.

The contracts also divided the Project into two sections for purposes of operation and maintenance: the storage system and power system, and the remainder of the project (irrigation and drainage system). The storage system was defined as "Elephant Butte Dam and Reservoir and appurtenant works and the Caballo Dam and Reservoir and appurtenant works, and the power system was defined as "[p]ower plants, transmission lines, etc., constructed for the development of power." The irrigation and drainage system was defined as "all project works except the storage and power systems." The federal defendants argue that since plaintiffs have not taken over the care, operation, and maintenance of the storage division, they are not entitled to Subsection I credit from that division, and that all the lands from Caballo Dam north are included in the storage division.

First, in the 1937 contracts, the definition of the storage system does not include all the lands surrounding the reservoirs, or, as defendants suggest, all the lands north

(but not south) of the reservoirs. Second, the storage system mentioned in the 1937 contracts, is not the same as a "storage division," as the word "division" is used in Subsection I. There is no indication that the drafters of Subsection I contemplated a project would be divided for purposes of operation and maintenance as the Rio Grande Project was divided in the 1937 contracts. Third, Subsection I itself states that when "water users take over the care, operation, and maintenance" of a division of a project, the "total accumulated net profits . . . shall be credited."

Finally, the federal defendants claim plaintiffs have not repaid the United States for the Subsection I lands in the storage system and are therefore not entitled to the revenues generated therefrom. It is true plaintiffs were relieved of the construction cost of Elephant Butte Dam in 1937 and, as a result of an agreement between the Departments of State and Interior, were not required to reimburse the reclamation fund for the construction of the Caballo Dam. However, there is no evidence these construction costs included the purchase of all the land from the borders of these reservoirs to the eastern, western, and northern limits of the Project. Nor is there evidence these costs were not included in the costs plaintiffs were required to repay to the fund.

NOW, THEREFORE,

IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment be granted and the federal defendants' cross-motion for partial summary judgment be denied. Plaintiffs are entitled to Subsection I credit for

net profits from the "leasing of project grazing and farm lands," to the extent described herein.

The parties have 30 days from entry of this order to supplement the pre-trial order entered May 1, 1991, pursuant to Part III(d)(1) of that order.

/s/ Howard C. Bratton
HOWARD C. BRATTON,
District Judge

43 U.S.C. Section 501

> Whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct.

Public Law 87-542

AN ACT

> To provide for the establishment and administration of basic public recreation facilities at the Elephant Butte and Caballo Reservoir area, New Mexico, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is authorized and directed to investigate, plan, construct, operate, and maintain basic recreation facilities at Elephant Butte and Caballo Reservoirs, Rio Grande Federal reclamation project, New Mexico (including access roads and facilities for the safety,

health, and protection of the visiting public), and to provide for the public use and enjoyment of such recreation facilities and the water areas of such reservoirs in such manner as is consistent with the primary purpose of such project. The cost of such recreation facilities shall be nonreimbursable and nonreturnable.

SEC. 2. The construction of recreation facilities at or near Elephant Butte and Caballo Reservoirs, as herein authorized, shall not provide in any manner whatsoever a basis for the allocation of water for recreation use or for the allocation of reservoir capacity for recreation use; and the priority for irrigation use of water stored in Elephant Butte and Caballo Reservoirs and the priority of use for irrigation purposes of the capacities of such reservoirs shall not be affected in any manner by the provision for recreation facilities as authorized herein.

SEC. 3. The Secretary of the Interior may issue such rules and regulations as are necessary to carry out the provisions of this Act and may enter into an agreement with the State of New Mexico, or a political subdivision thereof, for the administration, operation, and maintenance of the facilities herein authorized.

SEC. 4. There are authorized to be appropriated such amounts, but no more than $607,000, as may be necessary to carry out the provisions of this Act.

Approved July 25, 1962.

16-2-11. Acquisition of lands for park and recreational purposes; criteria.

A. The state is authorized to acquire lands or interests in lands for state park or state recreational purposes, by gift, donation, devise or purchase, for the use of the state and to develop, hold, maintain and operate the same as state parks or state recreational areas, in accordance with the provisions of this article and as it may be supplemented by other state laws. In acquiring real property or any interest therein, the power of eminent domain shall not be used. The criteria for such acquisition and development shall be as provided in Subsections B through G of this section.

* * *

J. Any acquisition of real property or any interest therein for state park or recreation purposes shall be approved by the legislature prior to the execution of any written agreement binding the state to expenditure of any funds for acquisition or development of state parks or recreation areas.

16-2-12. Acquisition of federal land for park and recreational uses.

The legislature of New Mexico, taking cognizance that the federal government, under the provisions of the Recreation and Public Purposes Act of June 14, 1926, as amended, has authorized the department of the interior

to sell to the states federal land at a price of two dollars fifty cents ($2.50) per acre or to lease to the states land at the price of twenty-five cents ($.25) per acre a year, for recreational purposes, and the legislature taking further cognizance of the fact that public park and recreation areas are of vital importance in the development and growth of this state, and noting that valuable and scenic land areas within New Mexico may be purchased or leased at minimal cost for development as park.

16-2-13. Title to park and recreational lands; acceptance.

Title to or right in property to be used for state park or state recreational purposes may be taken in the name of the "State of New Mexico" or in the name of the "Governor of the State of New Mexico and the people thereof". But no such property or rights therein shall be acquired by the state for state park or state recreational purposes until the property or rights therein have been duly accepted by written agreement of the secretary or by act of the state legislature and an appropriate name has been designated for such park or state recreational area.

ORIGINAL

Contract No. 14-06-500-2087

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

RIO GRANDE PROJECT, NEW MEXICO-TEXAS

LEASE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF NEW MEXICO, ACTING BY AND THROUGH THE NEW MEXICO STATE PARK AND RECREATION COMMISSION, FOR THE LEASE OF LANDS WITHIN ELEPHANT BUTTE AND CABALLO RESERVOIR AREAS FOR DEVELOPMENT, OPERATION, AND MAINTENANCE FOR PUBLIC RECREATION PURPOSES

THIS LEASE AGREEMENT, herein called the Lease, made and entered into this 1st day of April, 1973, in pursuance of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, including particularly the Act of Congress of July 25, 1962 (Public Law 87-542, 76 Stat. 171), 87th Congress, herein collectively called the Federal Act, by and between the UNITED STATES OF AMERICA, herein called the United States, acting by and through the Bureau of Reclamation of the United States Department of the Interior, herein called the Bureau, and the STATE OF NEW MEXICO, herein called the State, acting by and through the New Mexico State Park and Recreation Commission, herein called the Commission.

WITNESSETH THAT:

WHEREAS, the United States owns and the Bureau administers the Rio Grande Federal Reclamation Project,

herein referred to as the Project, which includes certain lands, water areas, housing units, and other improvements and facilities in and adjacent to the Elephant Butte and Caballo Reservoir areas, located in Sierra and Socorro Counties in the State of New Mexico, all as shown on Exhibit A attached hereto and by this reference made a part hereof; and

WHEREAS, the Bureau has determined that it is in the public interest to convey to the State a leasehold interest in a portion of the lands, water areas, units, improvements, and facilities in the vicinity of Elephant Butte Reservoir and Caballo Reservoir, hereinafter called the Leased Premises; and

WHEREAS, Chapter 98 of the Emergency Laws Enacted by the Twenty-sixth Legislature of the State of New Mexico, 1963, being Senate Bill No. 196, approved March 6, 1963 (such statute and all laws amendatory thereof or supplementary thereto now in force being herein called the State Law), provides for the creation of the Commission, a State agency designated the State Park and Recreation Commission, and authorizes the Commission to develop, maintain, manage, and supervise all State parks and all recreation areas which are owned or leased from the United States by the State; and

WHEREAS, the Commission is authorized under State Law, among other things, to acquire lands or interests in lands for State park or State recreational purposes by gift, donation, devise, or purchase for the use and in the name of the State and to develop, hold, and maintain and operate such lands and interests in lands as State parks or State recreational areas in accordance with State

Law, and the Commission is also authorized and empowered, upon the execution of a written agreement by the Commission with the United States therefor to develop, protect, maintain, and operate federally owned lands leased to the Commission in accordance with such agreement, as State parks or State recreational areas; and

WHEREAS, the Commission has determined that it is in the public interest and desirable to acquire a leasehold interest in the Leased Premises from the United States for the purpose of carrying out, to the extent that funds therefor are made available to the Commission, the objectives and purposes of this Lease under the Federal Act and the State Law.

NOW THEREFORE, the parties hereto agree as follows:

LEASE BY UNITED STATES

1. The United States, by virtue of the authority conferred under the Federal Act and in consideration of the observance and performance by the State of its contractual obligations under this Lease, hereby leases the Leased Premises to the State.

STATE WILL OPERATE LEASED PREMISES

2. The State, through the Commission, does hereby accept lease of the Leased Premises and will occupy, use, operate, maintain, develop, improve, manage, and supervise the Leased Premises in conformity with the terms and conditions of this Lease; provided, however, that the Commission shall not be obligated to develop or improve

the Leased Premises except to the extent that funds therefore are available to the Commission for such purpose.

INTERFERENCE WITH PROJECT FACILITIES PROHIBITED

3. The State will not interfere with or impede the Bureau's operation and maintenance of any Project facilities owned and operated by the United States.

ACCESS TO LEASED PREMISES RETAINED IN UNITED STATES

4. a. The officers, employees, agents, contractors, and assigns of the United States will have the right of ingress, passage over, and egress from and into the Leased Premises for the purpose of operating and maintaining the project, including the construction, operation, and maintenance of channels, drainage of ponded areas, clearing of phreatophytes, and conducting soil and water conservation activities. Rights of the Commission acquired hereunder are inferior and subordinate to the rights of the United States, its successors and assigns, to operate the reservoirs and all Rio Grande reclamation project facilities in the area for reclamation project purposes.

b. The construction of recreation facilities at or near Elephant Butte and Caballo Reservoirs shall not provide a basis for the allocation of project water for recreation use or for the allocation of reservoir capacity for recreation use; and the priority for irrigation use of water stored in Elephant Butte and Caballo Reservoirs and the priority of

use for irrigation purposes of the capacities of such reservoirs shall not be affected in any manner by the provision for recreation facilities as provided herein.

c. The State's leasehold interest acquired hereunder is subject to the right and power of the United States, its agents, successors, assigns, lessees, licensees, and permittees to remove from the Leased Premises any materials necessary for the construction, operation, or maintenance of the project and all features of the project, provided it does not interfere with improvements previously completed by the Commission, and to prospect for and develop and produce oil, gas, and other minerals in the Leased Premises. In its exercise of such rights and powers the United States shall take or cause to be taken reasonable measures to avoid (1) impeding the occupancy, use, operation, maintenance, development, improvement, management, or supervision of the Leased Premises for public recreation purposes by the State or any of its concessionaires, licensees, permittees, or lessees, or (2) jeopardizing the security or the rights of the holders of any Bonds.

d. In order to enable the Commission to take appropriate protective measures with reference to the Leased Premises, the United States shall give or cause to be given to the Commission reasonable advance notice of any projected exercise of reserved rights or powers which may adversely affect the Leased Premises, the interest of the State therein, or the security or the rights of the holders of any Bonds.

TITLE TO LEASED PREMISES NOT WARRANTED

5. The United States does not warrant title to the Leased Premises.

EXISTING LEASES AND CONTRACTS ASSIGNED TO STATE

6. The United States hereby assigns, transfers, and conveys all of its rights, title, interest, and unaccrued rents and benefits in and to all leases and contracts respecting the Leased Premises heretofore executed by the United States, including cabin site leases, trailer site leases, club site leases, and all group or organizational leases executed by the United States prior to the date of this Lease, provided, however, that the United States shall not transfer to the Commission any moneys paid to the United States prior to the date of this Lease. The State hereby accepts such assignment, transfer, and conveyance by the United States of said leases and contracts. The State may negotiate, grant, execute, and administer agreements with third parties granting concessions, licenses, permits, and leases for the occupancy, use, operation, maintenance, development, and improvement of the leased Premises for public recreation purposes; provided, however, that the State shall include in each such agreement granting any concession, license, permit, or lease appropriate provisions requiring that all provisions of this Lease and the Federal Law be fully observed and complied with to the extent applicable. Concession agreements shall not be effective until approved by the Bureau. Any concession agreement shall be reviewed by the Bureau within thirty (30) days of date of receipt by the

Bureau. Failure to review or approve within thirty (30) days shall constitute automatic approval.

RULES AND REGULATIONS – STATE

7. Use of the leased areas at Elephant Butte and Caballo reservoirs for recreation shall be administered by the Commission. The Commission shall promulgate regulations, issue permits, provide area zoning, time schedules, etc., and police as necessary. No portion of the shorelines will be reserved for private use. The Commission shall prepare and submit to the Bureau at the close of each calendar year, on a summary form provided by the Bureau, a report of recreation use and facilities provided the public.

RULES AND REGULATIONS FOR PROTECTION OF PROJECT – UNITED STATES

8. The Leased Premises shall be occupied, used, operated, maintained, developed, improved, managed, and supervised in conformity with such reasonable rules and regulations for protection of the project as are issued or approved by the Bureau. By mutual agreement, the parties may adopt a management plan for all or any part of the area.

IMPROVEMENT AND MAINTENANCE OF RECREATION FACILITIES

9. The Commission may (1) construct or cause to be constructed in and upon the Leased Premises buildings, improvements, lodges, cabins, other accommodations,

fences, signs, walls, piers, and other structures of any and all types useful or convenient for recreation purposes; (2) provide or cause to be provided equipment, machinery, furnishings, and other facilities; and (3) perform or cause to be performed such landscaping, seeding, and planting work for and in connection with the Leased Premises as may be deemed desirable by the Commission, provided that all major construction, facilities, and work shall be performed or furnished in accordance with plans and specifications approved in advance by the Bureau. Provided, however, that changes in any such plans or specifications so approved found necessary by the Commission may be made without approval thereof by the Bureau to the extent that such changes are determined by the Commission to be minor in nature and are consistent with this Lease and the Federal Law, and the Bureau shall be promptly informed thereof.

BONDS AND OTHER OBLIGATIONS

10. The State may issue revenue bonds or assume other obligations to pay the cost of buildings, improvements, and other structures and facilities necessary or desirable for the development, improvement, operation and maintenance of the Leased Premises for public recreation purposes. The collection, administration, and expenditure of revenues and other moneys will be subject to requirements protecting the security of the Bonds, and the Bureau, to the fullest extent feasible and consistent with project administration, shall avoid any action with respect to the Leased Premises which would prejudice or impair the security of the Bonds to the detriment of the holders thereof.

DEVELOPMENT OF LEASED PREMISES

11. The Commission may proceed with the development and improvement of the Leased Premises for public recreation purposes and may prosecute to completion a program of improvement and development in general accordance with "Special Report Recreation Use, Development and Operation, Elephant Butte and Caballo Reservoirs, Rio Grande Project, New Mexico," prepared by the National Park Service in December 1958, including approved revisions thereto.

FEES – STATE

12. a. The Commission may fix, charge, and collect reasonable fees, charges, tolls, and rents for the use or occupancy of land and improvements or for any services rendered by or through the Leased Premises.

b. All revenues received by the Commission from use of the Leased Premises, including rents and other income from concessions, licenses, permits, leases, and other contracts, shall be accounted for through general accounting procedures. All revenue received by the Commission shall be utilized by the Commission for further development of Elephant Butte Lake State Park or Caballo Lake State Park, or may be deposited in a reserve account for accomplishing future public recreation development and improvements within the area of the Leased Premises: Provided, however, that any net income from State financed improvements may be used by the Commission for any purpose authorized by State law, as designated by the Commission.

c. Promptly after the close of each fiscal year, the State will cause an audit to be made by qualified accountants of its books and accounts for the preceding fiscal year and shall submit to the Bureau a report of each such audit setting forth the accountants' findings respecting the revenues, income, and other receipts, the expenditures for operation and maintenance, the number of visitors to the Leased Premises, the details of all Bonds and other obligations issued and outstanding, and other data and information respecting the use of the Leased Premises and all facilities in connection therewith. Revenues derived from licenses and permits required by State Law, such as fishing licenses, hunting licenses, boat operating permits, and State user fees shall not be included as revenue within the meaning of this subparagraph.

BOOKS, RECORDS AND REPORTS.

13. a. The Comptroller General of the United States, or any of his duly authorized representatives, and the Bureau, or any of its duly authorized representatives, shall have access to and the right to examine any directly pertinent books, documents, papers, and records of the State and the Commission involving transactions related to this Lease, which right shall continue until 3 years after the termination of this Lease or any extensions thereof. Pertinent books, documents, papers, and records shall be retained and recorded in accordance with the New Mexico Public Records Act (71-6-2 et seq. New Mexico Statutes).

b. The Commission shall include in all agreements of the State granting any concession, license, permit, or leasehold or pertaining to the operation, maintenance, development, or improvement of the Leased Premises a provision permitting the Comptroller General of the United States, or any of his duly authorized representatives, and the Bureau, or any of its duly authorized representatives, until the expiration of 3 years after the termination of the respective agreement, to have access to and the right to examine any directly pertinent books, documents, papers, and records pertaining to such agreement and the Leased Premises. This provisions [sic] shall not be applicable to (1) purchase orders not exceeding $2,500 and (2) agreements or purchase orders for public utility services at rates established for uniform applicability to the general public.

STATE RULES AND REGULATIONS

14. The Commission shall, within the limits of its authority, make and enforce such rules and regulations for the occupancy, use, operation, maintenance, development, and improvement of the Leased Premises as are necessary and desirable for public recreation purposes, securing any Bonds that may be issued, protecting the health and safety of persons using the Leased Premises and preserving law and order; provided, however, that such rules and regulations shall not be in conflict with this Lease.

MAINTENANCE OF LEASED PREMISES, UTILITIES AND SERVICES

15. The Commission shall, during the term of this Lease and to the extent of funds available therefor:

a. Maintain all trails, streets, and roads within the Elephant Butte and Caballo Reservoir areas which are presently constructed, or which may hereafter be constructed by the State, except the following roads which are to be maintained by the Bureau:

(1) The road below, approaching, and crossing Elephant Butte Dam and in the main administration area south of the dam.

(2) The main road approaching and crossing Caballo Dam.

b. Maintain the grounds within the Leased Premises including maintenance in "as is" condition of water, sewer, and outdoor electrical systems, trash and garbage collection, and provide water and power for such maintenance and for outdoor lighting.

HOLD HARMLESS CLAUSE

16. The Commission shall not do, or knowingly permit to be done by others, anything which may jeopardize the health or safety of any person on the Leased Premises or which may damage or destroy any property or improvements in or upon the Leased Premises. To the extent of its authority, the Commission shall save the United States harmless from any claim on account of death, personal injury, or property damage by reason of anything done, or knowingly suffered or omitted to be

done, by the Commission in its exercise of the rights, powers, and privileges granted by this Lease. Nothing in this Lease shall be construed or interpreted as authorizing (1) the Commission, its agents or employees to act as the agent or representative of or on behalf of the United States or to incur any obligation of any kind on behalf of the United States or (2) the Bureau, its agents or employees to act as the agent or representative of or on behalf of the State or to incur any obligation of any kind on behalf of the State.

INSURANCE; ELEVATION RESTRICTIONS

17. The Commission shall provide in its agreements with concessionaires, permittees, licensees, and lessees for carrying such public liability, fire, theft vandalism, and other insurance as is customary for similar operations under comparable circumstances, which insurance shall be subject to the approval of the Commission. In the event of major or total destruction or any improvement constructed with Federal funds, the Commission shall determine whether the insurance shall be paid to the United States or used for restoration or construction of similar facilities to be mutually agreed upon. Notwithstanding any other provision in this Lease to the contrary, no building shall be constructed in Elephant Butte Reservoir below elevation 4411 USBR datum (4 feet above the crest of the spillway), nor in Caballo Reservoir below elevation 4184 USBR datum (2 feet above the top of the spillway gates).

DOMESTIC WATER SUPPLY

18. a. To the extent requested by the Commission, the United States will provide water through its existing distribution system whenever water is determined by the United States to be conveniently available for such service. The Commission shall be required to pay to the United States the rate designated by the United States for water, which rate shall be based upon the cost of production.

b. The obligation of the United States for treatment of water furnished under paragraph *a* of this article shall be limited to providing water with primary chlorination.

c. The United States shall not be responsible or liable for its failure to provide water under this Lease.

UTILITIES AND SERVICES

19. The Commission shall provide and deliver all necessary electrical power, sanitary services, and other utilities designated for areas covered by this lease.

TERMINATION

20. a. This Lease shall be effective as of the date of this agreement, and continue for fifty (50) years; provided however, that at the option of the United States, this lease agreement may be revoked and terminated in the event the State violates or breaches any of its obligations or covenants assumed in this agreement, and fails to correct, remedy, or eliminate such violation or breach to the satisfaction of the United States within a period of 180 days

after notice in writing of the specific violation or breach is given to the Commission by the Bureau. The Bureau shall send a copy of any notices issued under this article to the Trustee under the trust indenture in the event bonds secured by such trust indenture are outstanding; however, failure to send such copy shall not affect the validity of the notice.

b. Prior to the expiration of the initial term of this contract, the parties shall consider the desirability of an additional lease for the purpose of enabling the State to pay in full any bonds or other obligations (herein called the Bonds) which it may issue to pay the cost of any part of any development or improvement of the Leased Premises or any facilities for or in connection with the Leased Premises.

c. The Commission, at its option, may terminate this Lease by giving written notice to the Bureau, with or without assigning any cause or reason therefor; provided, however, that any such termination shall become effective on January 1 next succeeding the expiration of a period of not less than 1 year from the date such written notice is given.

d. Upon the termination of this Lease, whether by expiration of the term, revocation or otherwise, the Commission shall promptly vacate the Leased Premises and return possession thereof to the United States, and within a period 180 days from the date of such termination, or such longer period as the Bureau may in writing allow, the Commission may remove or cause to be removed from the Leased Premises all property and facilities,

whether real or personal property, owned by the Commission or any concessionaire, licensee, permittee, or lessee of the Commission, and shall restore the Leased Premises or cause to be restored to a good and satisfactory condition without cost to the United States, and if the State shall fail or neglect to remove such property and facilities within the time specified, then said property and facilities shall become property of the United States free of any obligation on the part of the United States to compensate anyone for or to pay damages in connection with such property or facilities so acquired by the United States. The inventory and condition report, herein marked Exhibit B and by reference made a part of this Lease, lists in detail and describes the condition of the personal property, buildings, and other improvements of the United States which are hereby transferred to the State pursuant to this Lease as part of the Leased Premises. Upon the expiration, revocation, or termination of this Lease, a similar inventory and condition report shall be prepared and submitted by the State to the Bureau. Upon approval thereof by the Bureau, said inventory and condition report shall constitute the basis for any settlement, reasonable wear and tear excepted, by the State for property of the United States transferred to the State under this Lease which is lost, damaged, or destroyed by reason of the State's negligence or other cause imposing liability upon the State.

ASSIGNMENT LIMITED – SUCCESSORS AND ASSIGNS OBLIGATED

21. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto

but no assignment or transfer of this contract or any part or interest therein shall be valid until approved by the Bureau.

COVENANT AGAINST CONTINGENT FEES

22. The Commission warrants that it has not employed any person to solicit or secure this Lease upon agreement for a commission, percentage, brokerage, or contingent fee. Any breach of this warranty shall give the United States the right to annul the Lease or, in its discretion, to deduct from any amount payable under this Lease by the United States to the State the amount of such commission, percentage, brokerage, or contingent fee.

EQUAL OPPORTUNITY

23. a. During the performance of this Lease Agreement Commission agrees as follows:

(1) The Commission will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Commission will take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including appenticeship. The Commission agrees to post

in conspicuous places, available to employees and applicants for employment, notices to be provided by the Bureau setting forth the provisions of this Equal Opportunity clause.

(2) The Commission will, in all solicitations or advertisements for employees placed by or on behalf of the Commission, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The Commission will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the contracting officer, advising the labor union or workers' representative of the Commission's commitments under this equal opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Commission will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Commission will furnish all information and reports required by said amended Executive Order, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting officer and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Commission's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the Commission may be declared ineligible for further Government contracts in accordance with procedures authorized in said amended Executive Order, and such other sanctions may be imposed and remedies invoked as provided in said Executive Order or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Commission will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of said amended Executive Order so that such provisions will be finding upon each subcontractor or vendor. The Commission will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: provided, however, that in the event the Commission becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Commission may request the United States to enter into such litigation to protect the interests of the United States.

b. Inclusion of the above nondiscrimination clause in subcontracts may be by reference to section 201 of Executive Order No. 11246 of September 24, 1965, as amended. Subcontracts below the third tier, other than subcontracts calling for construction work at the site of

construction, are exempt from the requirements of the clause.

c. (1) Definitions: (a) the term Commission shall mean the employees, agents, lessees, sublessees, concessionaires, and contractors, and the successors in interest; (b) the term facility shall mean any and all services, facilities, privileges, accommodations, and activities available to the general public and permitted by this agreement.

(2) The Commission shall not: (a) publicize any facility operated hereunder in any manner that would directly or inferentially reflect upon or question the acceptability of any person because of race, color, religion, sex, ancestry, or national origin; (b) discriminate by segregation or other means against any person because of race, color, religion, sex, ancestry, or national origin in furnishing or refusing to furnish such person the use of any such facility.

(3) The Commission shall post the following notice in such a manner where any facility is available so as to ensure that its contents will be conspicuous to any person seeking employment or use of any facility. Such notice will be furnished the Commission by the Secretary.

NOTICE

THIS IS A FACILITY OPERATED IN AN AREA UNDER THE JURISDICTION OF THE UNITED STATES DEPARTMENT OF THE INTERIOR.

NO DISCRIMINATION BY SEGREGATION OR OTHER MEANS IN THE FURNISHING OF ACCOMMODATIONS, FACILITIES, SERVICES, OR PRIVILEGES ON THE BASIS OF RACE, COLOR, RELIGION, SEX, ANCESTRY, OR NATIONAL ORIGIN IS PERMITTED IN THE USE OF THIS FACILITY. VIOLATIONS OF THIS PROHIBITION ARE PUNISHABLE BY FINE, IMPRISONMENT, OR BOTH. COMPLAINTS OF VIOLATIONS OF THIS PROHIBITION SHOULD BE ADDRESSED TO THE UNITED STATES DEPARTMENT OF THE INTERIOR, WASHINGTON, D. C. 20240

(4) The Commission shall require in all of its contracts or other forms of agreement for the operation of a facility pursuant to this agreement, inclusion and compliance with provisions identical with those stated in subsections (1), (2), (3), and (4) herein.

WATER AND AIR POLLUTION CONTROL

24. The Commission shall, within its legal authority, comply fully with all applicable Federal laws, orders, and regulations, and the laws of the State of New Mexico, all as administered by appropriate authorities, concerning the pollution of streams, reservoirs, groundwater, or water courses with respect to thermal pollution or the discharge of refuse, garbage, sewage effluent, industrial waste, oil, mine tailings, mineral salts, or other pollutants, and concerning the pollution of air with respect to redioactive materials or other pollutants.

NOTICES

25. Any notice, demand, or request authorized or required by this contract shall be deemed to have been given when mailed, postage prepaid, or delivered to the Regional Director, Southwest Region, Bureau of Reclamation, Amarillo, Texas, on behalf of the United States or the Bureau, and to the Director, New Mexico State Park and Recreation Commission, Santa Fe, New Mexico, on behalf of the State or the Commission. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

OFFICIALS NOT TO BENEFIT

26. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF, the United States of America and the State of New Mexico hereto have executed this agreement as of the day and year first above written.

THE UNITED STATES
OF AMERICA

Department of the Interior
Bureau of Reclamation

By /s/ R.B. Ledyard
Acting Regional Director,
Southwest Region

CONCUR:

National Park Service

By /s/ Monte E. Fitch

Title Acting Regional Director

LEGAL APPROVAL:

By /s/ Illegible

Title Field Solicitor

SEAL

ATTEST:

/s/ Illegible
Secretary

LEGAL APPROVAL:

/s/ Leila A. Andrews Assistant Atty Gen
Attorney-General
State of New Mexico

817/73

STATE OF NEW MEXICO

New Mexico State Park and
Recreation Commission

By /s/ S.Q. Merino
Chairman

EXHIBITS

Exhibit A – Map showing all reservoir areas (Elephant Butte and Caballo)

Exhibit B – Inventory and Condition Report